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2532
No. 11927

United States
Circuit Court of Appeals
For the Ninth Circuit.

PATSY O'ROURKE KENDIG,

Appellant,

vs.

MARY BOONE KENDIG, AND UNITED
STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Arizona

FILED
JUL -2 1948

PAUL P. O'BRIEN,
CLERK

No. 11927

United States
Circuit Court of Appeals
For the Ninth Circuit.

PATSY O'ROURKE KENDIG,
Appellant,
vs.

MARY BOONE KENDIG, AND UNITED
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for the District of Arizona

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

GUST, ROSENFELD, DIVELBESS,
ROBINETTE and LINTON,

Security Building,
Phoenix, Arizona.

Attorneys for Appellant.

F. E. FLYNN,

United States Attorney,
Phoenix, Arizona.

CUNNINGHAM & CARSON,

419 Title & Trust Building,
Phoenix, Arizona,

Attorneys for Appellees. [3*]

PATSY O'ROURKE KENDIG, A Widow,
Plaintiff,

vs.

MARY BOONE KENDIG, a widow, and UNITED
STATES OF AMERICA,

Defendants.

FILINGS-PROCEEDINGS

Date

1946

May 15—File plaintiff's complaint

May 15—File plaintiff's praecipe for summons

May 15—Issue summons

June 19—File summons to United States of America
returned by Marshal showing service on
defts.

June 20—File deft. Kendig's Answer

July 15—File Answer of United States of America
by F. E. Flynn, U. S. Atty.

1947

Mar. 31—File plaintiff's Motion to Set for trial and
notice for hearing for April 7, 1947.

Apr. 8—Docket proceedings had 4/7/47. Plaintiff's
Motion to set trial on reg. for hearing.
Linton pres. for plaintiff and requests
jury trial. McAlister pres. for Govt. No
appearance for deft. Mary Boone Kendig.
Order set for trial Sept. 9, 1947, at ten
o'clock a.m.

1947

Apr. 8—Issue notice to counsel

Sept. 2—Harold Divelbess pres. for pltf. Gene Cunningham pres. for deft. Mary Boone Kendig. On stipulation of counsel order vacate order setting this case for trial Sept. 9, 1947, and order set for trial Tues., Oct. 7, 1947, at ten a.m.

Sept. 25—Harold Divelbess for pltf. Gene Cunningham for deft. Mary Boone Kendig. Chas. B. McAlister, for Govt. On motion McAlister, opposing counsel consenting thereto, Order vacate order setting this case for trial Oct. 7, 1947, and order set for trial Oct. 28, 1947, at ten a.m.

Oct. 2—File Deposition of Geo. Kendig

Oct. 28—On reg. for trial. Pltf. pres. with counsel Harold Divelbess and Walter Linton. Deft. Mary Boone Kendig pres. with her counsel Gene S. Cunningham and Wm. Messinger. Chas. B. McAlister pres, for Govt. Billar pres. as reporter. Lawful jury of 12 persons empaneled to try case. Enter proceedings of trial. File pltf's Exhibits Nos. 1 to 3 incl. and deft. Kendig's Exhibit A. Counsel for deft. Kendig now moves to strike portions of pltf's Exhibit 1, on ground same is hearsay and conclusions of witness and moves for dismissal of cause of action on account of insufficient evidence. Order motions submitted and taken under advisement. At 3:15 p.m.

1947

recess to 10 a.m. Oct. 29, 1947. On motion McAlister, order allow veterans Adm. to withdraw deft. Kendig's Exhibit A on substituting of Photostat copy thereof.

Oct. 28—File jury list

Oct. 29—On reg. for further trial. All pres. pursuant to recess and further trial now had. Enter proceedings of trial. Cunningham on behalf of deft. Mary Boone Kendig now moves for directed verdict; Order motion for directed verdict granted. Jury is now instructed to return verdict for defts. Foreman of jury appointed, and verdict signed, and presented: "We, the jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find for the defendants." Verdict recorded, and jury discharged.

Oct. 29—Enter and file verdict "for defendants"

Nov. 7—Order form of judgment for defts. approved as to form by all counsel herein, be filed, entered and spread on minutes as the judgment in this case, as follows.

Nov. 7—Enter and file judgment for defts. on directed verdict. (Notation of judgment made in Civil docket 11/7/47).

Nov. 15—File Plaintiff's Motion for New Trial and Memo. in Support thereof.

Nov. 25—File Memo. of deft. Mary Boone Kendig, in reply to Memo. of pltf. on Motion for New Trial

1948

Jan. 13—Pltf's Motion for a New Trial having been submitted and taken under advisement, it is ordered that said motion for New Trial be and it is denied. (Notation made in civil docket 1/13/48.)

Jan. 13—Issue notice to counsel.

Mar. 30—File reporter's transcript in duplicate

Mar. 30—File pltf's Notice of Appeal

Mar. 30—Fwd. copy of Notice of Appeal to F. E. Flynn, U. S. Atty. and Cunningham and Carson, attys. for deft. Kendig.

Mar. 30—File bond on Appeal in sum of \$250.00 with Fidelity and Deposit Co. of Maryland as surety thereon.

Mar. 31—File pltf's Designation of Portions of Record and Proceedings to be contained in Record on Appeal.

May 4—Enter and file Order for Transmittal of Certain Original Exhibits and Reporter's Transcript to Circuit Court of Appeals.

In the District Court of the United States
for the District of Arizona

No. Civil 863, Phoenix

PATSY O'ROURKE KENDIG, a Widow,
Plaintiff,

vs.

MARY BOONE KENDIG, a Widow, and UNITED
STATES OF AMERICA,
Defendants.

COMPLAINT

Comes now the plaintiff, and for cause of action
alleges:

I.

That plaintiff and defendant, Mary Boone Kendig, are residents of Phoenix, Maricopa County, Arizona;

That this action is brought by the plaintiff as the surviving widow of Wiley SoRelle Kendig, deceased, to recover as beneficiary under a National Service Life Insurance Policy issued on the life of Wiley SoRelle Kendig, pursuant to the provisions of the National Service Life Insurance Act of 1940, c. 757, Title VI, Part 1, 54 Stat. 1014; 38 U.S.C.A. Ch. 13; that both the plaintiff, Patsy O'Rourke Kendig and the defendant, Mary Boone Kendig, claim to be the beneficiary under said policy; that the claim of plaintiff has heretofore been filed with the Director of Insurance, Veterans Administration,

and denied; that sixty (60) days have not elapsed since the date of disallowance of plaintiff's claim. That by reason of the foregoing facts, the jurisdiction of this court is invoked pursuant to the provisions of Sec. 38 U.S.C.A. 817 and 38 U.S.C.A. 445.

II.

That Wiley SoRelle Kendig enlisted in the United States Navy in July, 1941; that thereafter, upon application, he was granted Ten Thousand (\$10,000.00) Dollars National Service Life Insurance, effective August 21, 1941, for which his mother, the defendant, Mary Boone Kendig was designated beneficiary.

That thereafter, on November 29, 1943, the said Wiley SoRelle Kendig and the plaintiff, Patsy O'Rourke Kendig were married; that subsequent to his marriage to plaintiff, the said Wiley SoRelle Kendig changed the beneficiary on his policy of National Service Life Insurance, designating his wife, Patsy O'Rourke Kendig, plaintiff herein, as beneficiary.

III.

That on March 23, 1944, the said Wiley SoRelle Kendig was killed; that thereafter, both the plaintiff and the defendant, Mary Boone Kendig, filed claims for said insurance. That the Director of Insurance, Veterans Administration, has denied the claim of plaintiff.

That plaintiff has been informed, and believes, and upon such information and belief alleges that

the said Wiley SoRelle Kendig took such steps as were necessary to effect a change of beneficiary on his policy of National Service Life Insurance from the defendant, Mary Boone Kendig to the plaintiff.

IV.

That subsequent to the death of the said Wiley SoRelle Kendig, there was born to the plaintiff as the issue of the marriage of plaintiff and said Wiley SoRelle Kendig, a son:

That National Service Life Insurance was made available by the United States Government to provide benefits for the dependents of those killed while serving in the armed forces of the United States; that the [7] marriage of plaintiff with the said Wiley SoRelle Kendig, and the subsequent birth of a son, the issue of said marriage, notwithstanding the rules and regulations of the Director of Insurance, Veterans Administration, as a matter of law constitutes a revocation of the designation of beneficiary made by the said Wiley SoRelle Kendig, prior to his said marriage.

Wherefore, plaintiff prays judgment of this court:

- (1) Finding and declaring plaintiff to be the beneficiary of the policy of National Service Life Insurance issued on the life of Wiley SoRelle Kendig, now deceased;
- (2) Or, that the designation of beneficiary made by the said Wiley SoRelle Kendig, prior to

his marriage with plaintiff was, by reason of his marriage and the birth of a son, revoked as a matter of law;

(3) And for such other orders as are proper in the premises.

GUST, ROSENFELD,
DIVELBESS, ROBINETTE
and LINTON,
By HAROLD L. DIVELBESS,
Attorneys for Plaintiff.

State of Arizona,
County of Maricopa—ss.

Patsy O'Rourke Kendig, being first duly sworn upon oath deposes and says:

That she is the plaintiff herein; that she has read the foregoing complaint and knows the contents thereof; that the matters and things therein alleged are true; except as to such matters as are alleged upon information and belief, and as to those, she believes them to be true.

PATSY O'ROURKE KENDIG.

Subscribed and sworn to before me this 14th day of May, 1946.

[Seal] HAROLD L. DIVELBESS,
Notary Public.

My Commission expires Dec. 27, 1948.

[Endorsed]: Filed May 15, 1946. [8]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant Mary Boone Kendig, a widow, by her attorneys Messrs. Cunningham & Carson and answering plaintiff's complaint admits, denies and alleges as follows:

I.

Admits the allegations contained in Paragraph I of plaintiff's complaint.

II.

Admits that Wiley SoRelle Kendig enlisted in the United States Navy in July, 1941, and that he was thereafter granted Ten Thousand Dollars (\$10,000) National Service Life Insurance effective August 21, 1941, for which his mother, the defendant Mary Boone Kendig, was designated beneficiary, and admits that on November 29, 1943, the said Wiley SoRelle Kendig and the plaintiff Patsy O'Rourke were married, but denies that subsequent to his marriage, or at any time, the said Wiley SoRelle Kendig changed the beneficiary on his policy of National Service Life Insurance to his wife, Patsy O'Rourke Kendig, the plaintiff, or to any other person. [9]

III.

Admits that the said Wiley SoRelle Kendig was killed on or about March 23, 1944, and that both the plaintiff and the defendant Mary Boone Kendig filed claims for said insurance and that the Director

of Insurance, Veterans' Administration, has denied the claim of plaintiff, but denies that the said Wiley SoRelle Kendig took such steps as are necessary to effect a change of beneficiary on his policy of National Service Life Insurance from the defendant Mary Boone Kendig to the plaintiff, and in connection therewith alleges that the said Wiley SoRelle Kendig failed to sign and forward a written notice of change of beneficiary to the Veterans' Administration as required by the rules and regulations of the Administrator of Veterans' Affairs, which said rules and regulations constitute part of the contract for the said National Service Life Insurance.

IV.

Admits that subsequent to the death of said Wiley SoRelle Kendig there was born to plaintiff as the issue of the marriage of plaintiff and said Wiley SoRelle Kendig, a son, but denies that the designation of beneficiary by the said Wiley SoRelle Kendig, prior to his marriage with plaintiff, was revoked as a matter of law by reason of his marriage and the birth of a son.

V.

Further answering said complaint defendant denies each and every allegation not specifically admitted or qualified.

Wherefore, defendant Mary Boone Kendig prays for judgment that plaintiff take nothing and be given no relief under her complaint and that judgment be given declaring the defendant Mary Boone

Kendig, a widow, to be the beneficiary of the policy of National Service Life Insurance carried on the life of Wiley [10] SoRelle Kendig, deceased, for her costs herein expended and for such other and further relief as to the Court may seem proper.

CUNNINGHAM & CARSON,
By GENE S. CUNNINGHAM,
Attorneys for Defendant,
Mary Boone Kendig, a Widow.

State of Arizona,
County of Maricopa—ss.

Mary Boone Kendig, being first duly sworn upon her oath, deposes and says:

That she is one of the defendants herein; that she has read the plaintiff's complaint in the above numbered and entitled cause and knows the contents thereof; that she has read the *fore-answer* and knows the contents thereof; that the matters and things in said complaint alleged which are in the foregoing answer denied, are untrue and that the matters and things affirmatively alleged in the foregoing answer are true, except as to those matters alleged upon information and belief, and as to those, she believes them to be true.

MARY BOONE KENDIG.

Subscribed and sworn to before me this 19th day of June, 1946.

[Seal]

G. S. CUNNINGHAM,

Notary Public.

My Commission expires 5/18/50.

Received copy of the within this 19th day of June, 1946.

GUST, ROSENFELD,
DIVELBESS, ROBINETTE
& LINTON,
By HAROLD L. DIVELBESS.

Copy received this 20th day of June, 1946.

CHARLES B. McALISTER,
Assistant U. S. Attorney.
By M. CRAWFORD,
Secretary. [11]

[Endorsed]: Filed June 20, 1946.

[Title of District Court and Cause.]

ANSWER

Now comes this defendant, United States of America, by F. E. Flynn, United States Attorney in and for the District of Arizona, and Francis J. McGan, Attorney, Department of Justice, and for its answer to the complaint filed herein says:

I.

This defendant admits the allegations of paragraph numbered 1 of plaintiff's complaint.

II.

This defendant denies the allegations of paragraph numbered II of plaintiff's complaint except to admit and allege that Wiley SoRelle Kendig en-

tered the naval service of the United States August 21, 1941 as an Aviation Cadet under serial number 114,398-2; that he was granted \$10,000 National Service Life Insurance under policy N-5,004,911 on August 21, 1941 and named Mary Boone Kendig, described as mother, as sole beneficiary; that he married Patricia E. O'Rourke, November 29, 1943; that he was killed in service in an airplane crash March 23, 1944, and on said date his policy aforesaid was in full force and effect.

III.

Defendant denies the allegations of paragraph numbered III of plaintiff's complaint except to admit and allege that Mary Boone Kendig [12] filed claim at the Veterans Administration for the benefits of the aforesaid policy, on April 5, 1944, and on March 17, 1945 was awarded benefits thereof at the rate of \$55.10 per month effective March 23, 1944 and that such award was suspended September 13, 1945; that Patsy O'Rourke filed her claim as widow of the insured for the benefits of his policy N-5,004,911 on July 18, 1944 and said claim was denied by the Veterans Administration February 2, 1946 of which she was notified by the Veterans Administration March 27, 1946.

IV.

Defendant denies the allegations of paragraph IV of plaintiff's complaint.

Wherefore this defendant, the United States of America, prays that the court upon final hearing;

- (1) Adjudge whether this defendant is obligated to pay the proceeds of policy N-5,004,911 to the plaintiff, Patsy O'Rourke Kendig (insured's widow) or to Mary Boone Kendig (his mother) and that this defendant be credited with a set-off in either event for the monthly insurance payments heretofore made to the latter.
- (2) Discharge this defendant, the United States of America, from any and all liability on policy N-5,004,911 except to the person or persons who shall be adjudged to be entitled to receive such insurance benefits.
- (3) For its costs and such further relief as to the court may seem just and proper.

/s/ FRANK E. FLYNN,

United States Attorney.

/s/ CHARLES B. McALISTER,

Assistant U. S. Attorney.

/s/ FRANCIS J. McGAN,

Attorney, Department of
Justice.

Receipt of copy of within pleading acknowledged
this 15th day of July, 1946.

GUST, ROSENFELD,

DIVELBESS, ROBINETTE,
& LINTON,

IVAN ROBINETTE,

Attorneys for Plaintiff.

[Endorsed]: Filed July 15, 1946. [13]

[Title of District Court and Cause.]

Minute Entry of Tuesday, October 28, 1947

PROCEEDINGS OF TRIAL

Honorable Dave W. Ling, United States District Judge, presiding

This case comes on regularly for trial this day. The parties herein are present with their counsel. Harold Divelbess, Esquire, and Walter Linton Esquire, appear as counsel for the plaintiff. Gene S. Cunningham, Esquire and William Messinger, Esquire, appear as counsel for the defendant Mary Boone Kendig. Charles B. McAlister, Esquire, Assistant United States Attorney, appears as counsel for the United States of America. Louis L. Billar appears as official court reporter.

A lawful jury of twelve persons is now duly empaneled and sworn to try this case.

Thereupon, It Is Ordered that all Jurors not empaneled in the trial of this case be excused until further order.

Walter Linton, Esquire, now reads the complaint to the Jury. Gene S. Cunningham, Esquire, reads the answer of the defendant Mary Boone Kendig to the Jury. Charles B. McAlister, Esquire, now reads the answer of the defendant, United States of America to the Jury.

Walter Linton, Esquire, now states the plaintiff's case to the jury. Counsel for the defendant reserve statement to the jury.

Plaintiff's Case:

Patsy O'Rourke Kendig is now sworn and examined in her own behalf.

Plaintiff's exhibit 1, deposition of George A. Kendig, is now admitted and read in evidence, subject to objections to be made by defendants.

And thereupon, at the hour of twelve o'clock noon, It Is Ordered that the further trial of this case be continued until two o'clock p.m. this date to which time the Jury, being first duly admonished by the Court the [17] parties and their counsel are excused.

Subsequently, at the hour of two o'clock p.m., the Jury and all members thereof, the parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

Plaintiff's Case Continued:

Patsy O'Rourke Kendig is now recalled and further examined in her own behalf.

The defendant Mary Boone Kendig's exhibit A, letter, is now admitted in evidence.

Plaintiff's exhibit 2, photostatic copy of affidavit is now admitted in evidence.

Plaintiff's exhibit 3 for identification, photostatic copy of confidential report is now read in evidence and restored to file of Veterans Administration.

Ralph E. Palmer is now sworn and examined for the plaintiff.

Whereupon, the plaintiff rests.

And thereupon, at the hour of 2:35 o'clock p.m., the Jury, being first duly admonished by the Court,

is excused until Wednesday, October 29, 1947, at ten o'clock a.m.

Counsel for the defendant, Mary Boone Kendig, now moves to strike portions of plaintiff's exhibit 1 on ground that same is hearsay and conclusion of witness and moves for dismissal. Charles B. McAlister, Esquire, counsel for the Government, joins in said Motion to Strike and moves for dismissal of cause of action on account of insufficient evidence.

It Is Ordered that the said motions be submitted and by the Court taken under advisement.

And thereupon, at the hour of 3:15 o'clock p.m. It Is Ordered that the further trial of this case be continued to ten o'clock a.m., Wednesday, October 29, 1947, to which time the parties and counsel are excused.

On motion of Charles B. McAlister, Esquire.

It Is Ordered that the Veterans Administration be allowed to withdraw Exhibit A of the defendant, Mary Boone Kendig, on substitution of a photostatic copy thereof. [18]

[Title of District Court and Cause.]

Minute Entry of Wednesday, October 29, 1947

ORDER GRANTING DIRECTED VERDICT

Honorable Dave W. Ling, United States District
Judge, presiding

The Jury and all members thereof, the parties
and their counsel being present pursuant to recess,
further proceedings of trial are had as follows:

Gene Cunningham, Esquire, on behalf of the de-
fendant, Mary Boone Kendig, now moves for di-
rected verdict, and

It Is Ordered that motion for directed verdict
be and it is granted and the jury is instructed to
return a verdict for the defendants. Whereupon,
Robert W. Goldwater is now appointed as Foreman
and signs and presents the following verdict:

“Patsy O’Rourke Kendig, a widow, plaintiff,
against Mary Boone Kendig, a widow, and
United States of America, Defendants.

VERDICT

We, The Jury, duly empaneled and sworn in
the above-entitled action, upon our oaths, do
find for the defendants.

ROBERT W. GOLDWATER,
Foreman.”

The verdict is read as recorded and the Jury is
discharged from the further consideration of this
case and excused until further order. [19]

[Title of District Court and Cause.]

Minute Entry of Friday, November 7, 1947

ORDER APPROVING FORM
OF JUDGMENT FOR DEFENDANTS

Honorable Dave W. Ling, United States District Judge, presiding.

It is ordered that the form of judgment for the defendants, approved as to form by all counsel herein, be filed, entered and spread upon the minutes as the judgment herein as follows:

Civ. 863. Patsy O'Rourke Kendig, Plaintiff,
vs. Mary Boone Kendig, a widow, and United
States of America, Defendants.

Judgment for Defendants
On Directed Verdict

This cause came on for trial before the court and a jury on the 28th day of October, 1947, all parties appearing by counsel; and the court, on motion of the defendants, having directed the jury to render a verdict for the defendants, and the jury having done so, in words as follows:

"We, The Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the defendants."

It Is Hereby Ordered, Adjudged And Decreed that the plaintiff take nothing, that the action be and it hereby is dismissed on the

merits; that the defendants have and recover from the plaintiff their costs in the action; and that the defendants have execution thereof.

Done in open court, this 7 day of November, 1947.

DAVE W. LING,
Judge.

Approved as to form:

GUST-ROSENFELD-
DIVELBESS-ROBINETTE
& LINTON,

By HAROLD L. DIVELBESS,
Attorneys for Plaintiff.

CUNNINGHAM, CARSON,
MESSINGER & CARSON

By GENE CUNNINGHAM,
Attorneys for Defendant,
Mary Boone Kendig.

FRANK E. FLYNN,
United States Attorney for
the District of Arizona,

By CHARLES B. McALISTER,
Attorney for Defendant,
United States of America.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the plaintiff, Ratsy O'Rourke Kendig, and moves the court to set aside the verdict and the judgment entered herein, and to grant plaintiff a new trial, for the following reasons:

1. The verdict is contrary to the law.
2. The verdict is contrary to the evidence.
3. The verdict is contrary to the law and evidence in the case.
4. The court erred in granting the defendants' motion for a directed verdict, upon the ground that the evidence offered by the plaintiff was insufficient, for the reason that the evidence was sufficient to require submitting the case to the jury on the question of whether or not Wiley SoRelle Kendig had sent in to the Veterans' Administration a change of beneficiary from his mother, Mary Boone Kendig to his wife, Patsy O'Rourke Kendig.

GUST, ROSENFELD,

DIVELBESS, ROBINETTE
& LINTON

By /s/ HAROLD L. DIVELBESS,
Attorneys for Plaintiff.

Received copy of within this 15th day of November, 1947.

CUNNINGHAM & CARSON
CHARLES B. McALISTER,
Att. U. S. Atty.

[Endorsed]: Filed Nov. 15, 1947. [24]

[Title of District Court and Cause.]

Minute Entry of Tuesday, January 13, 1948

ORDER DENYING PLAINTIFF'S MOTION
FOR NEW TRIAL

Honorable Dave W. Ling, United States District
Judge, presiding.

Plaintiff's Motion for New Trial having been
submitted and by the Court taken under advise-
ment,

It Is Ordered that said Motion for New Trial be
and it is denied.

(Notation entered in civil docket 1/13/48.) [25]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Patsy O'Rourke
Kendig, the plaintiff, does hereby appeal to the
United States Circuit Court of Appeals, for the
Ninth Circuit, from that certain Judgment rendered
in the above entitled Court and cause on the 7th
day of November, 1947, said judgment being en-
titled, "Judgment for Defendants on Directed Ver-
dict," and from the Order denying plaintiff's
Motion for New Trial, made and entered on the
13th day of January, 1948.

Dated the 30th day of March, 1948.

GUST, ROSENFELD,

DIVELBESS, ROBINETTE
& LINTON

By /s/ HAROLD L. DIVELBESS,

Attorneys for Appellant,

Patsy O'Rourke Kendig.

[Endorsed]: Filed Mar. 30, 1948. [26]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents:

That I, Patsy O'Rourke Kendig, the plaintiff above named, as principal, and Fidelity and Deposit Company of Maryland, as Surety, am held and firmly bound unto Mary Boone Kendig, a widow, and United States of America, defendants above named, in the sum of Two Hundred Fifty (\$250.00) Dollars, lawful money of the United States, to be paid to the said Mary Boone Kendig, a widow, and the United States of America, for which payment well and truly to be made I bind myself and my heirs, representatives and assigns, firmly by these presents.

The Condition of This Obligation Is Such That, Whereas, a certain Judgment, entitled, "Judgment for Defendants on Directed Verdict," was rendered and entered on the 7th day of November, 1947, in the above entitled court and cause, and

Whereas, the Court on the 13th day of January, 1948, [27] entered an order denying plaintiff's motion for a new trial; and

Whereas, the judgment and order were in favor of the above named defendants and against the principal on this bond; and

Whereas, the said principal has appealed to the United States Circuit Court of Appeals, for the Ninth Circuit, from said judgment, and from the order denying plaintiff's motion for a new trial;

Now, Therefore, if the said principal above named shall prosecute her said appeal with effect, and shall pay all costs which have accrued in the United States District Court for the District of Arizona, and which may accrue in the United States Circuit Court of Appeals, for the Ninth Circuit, then this obligation shall be void; otherwise, it shall remain in full force and effect.

In Witness Whereof, said principal and surety have executed these presents on this 27th day of March, 1948.

/s/ PATSY O'ROURKE KENDIG,
(Principal).

GUST, ROSENFELD,
DIVELBESS, ROBINETTE
& LINTON

By /s/ HAROLD L. DIVELBESS,
Attorneys for Appellant,
Patsy O'Rourke Kendig.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,
Surety.

[Seal] By C. A. DRUMMOND,
Attorney-in-Fact.

[Endorsed]: Filed Mar. 30, 1948. [28]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF THE
RECORD AND PROCEEDINGS TO BE
CONTAINED IN RECORD ON APPEAL.

Comes now the above named plaintiff and appellant, and designates the following portions of the record and proceedings to be contained in the record on appeal:

1. Complaint.
2. Answer of Defendant, Mary Boone Kendig, to Complaint.
3. Answer of Defendant, United States of America, to Complaint.
4. Verdict of Jury.
5. Judgment for Defendants on Directed Verdict.
6. Plaintiff's motion for new trial.
7. The Clerk's notation of Judgment in the civil docket.
8. Final Judgment, as entered by the Clerk in the Civil Order Book.
9. All Exhibits marked for identification, or received in evidence, in the case.
10. The Reporter's Transcript.
11. All Minute Entries made by the Clerk in said cause. [29]
12. Notice of Appeal.
13. Bond on Appeal.
14. This Designation.

Dated this 31st day of March, 1948.

GUST, ROSENFELD,
DIVELBESS, ROBINETTE
& LINTON,

By /s/ JAMES C. ENGBAHL,
Attorneys for Plaintiff and
Appellant.

[Endorsed]: Filed Mar. 31, 1948. [30]

[Title of District Court and Cause.]

ORDER FOR TRANSMITTAL OF CERTAIN
ORIGINAL EXHIBITS AND REPORT-
ER'S TRANSCRIPT TO CIRCUIT COURT
OF APPEALS.

Counsel for the appellant having designated that all exhibits marked for identification or received in evidence herein, together with the Reporter's Transcript, be contained in the record on appeal in this case, and it appearing to the court that the original of defendants' exhibit A in evidence has been withdrawn from the files and a photostatic copy substituted in lieu thereof; that plaintiff's exhibit 3 for identification has been read into the record and restored to the files of the Veterans Administration, and that plaintiff's exhibit 1 in evidence, to wit, the Deposition of George Kendig is fully set out in the Reporter's Transcript filed herein,

It Is Ordered that the Clerk of this Court be and he is authorized and directed to transmit to the

United States Circuit Court of Appeals for the Ninth Circuit as a part of the record on appeal herein, the original of the Reporter's Transcript, the original of plaintiff's exhibit 2—photostatic copy of Affidavit of George Kendig; and the substituted photostatic copy of defendants' exhibit A—letter dated February 28, 1944 to Bureau of Naval Personnel from Patsy Kendig, in lieu of copies.

Dated at Phoenix, Arizona, this 4 day of May, 1948.

DAVE W. LING,

United States District Judge.

[Endorsed]: Filed May 4, 1948. [31]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

United States of America,
District of Arizona.—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Patsy O'Rourke Kendig, a widow, Plaintiff vs. Mary Boone Kendig, a widow, and United States of America, Defendants, numbered Civ-863 Phoenix, on the docket of said Court.

I further certify that the attached pages numbered 1 to 32, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the Designation filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid, excepting the Reporter's Transcript and all exhibits marked for identification or received in evidence in the case.

I further certify that the original of the Reporter's Transcript and the original of plaintiff's exhibit 2, and the substituted photostatic copy of defendants' exhibit A are transmitted herewith and made a part of the record on appeal in said case pursuant to order of the court.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of \$8.00 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court this 5th day of May, 1948.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

In the District Court of the United States
for the District of Arizona

No. Civil 863

PATSY O'ROURKE KENDIG, a widow,
Plaintiff,

vs.

MARY BOONE KENDIG, a widow, and UNITED
STATES OF AMERICA,
Defendants.

REPORTER'S TRANSCRIPT

Phoenix, Arizona, October 28, 1947

Appearances:

For the Plaintiff: Messrs. Gust, Rosenfeld, Divelbess, Robinette & Linton, by Mr. Linton and Mr. Divelbess.

For the Defendants: Messrs. Cunningham, Carson, Messinger & Carson, by Mr. Cunningham and Mr. Messinger; Mr. Charles B. McAlister, Assistant United States Attorney.

Louis L. Billar, Shorthand Reporter, Phoenix, Arizona.

The above entitled and numbered cause came on duly and regularly for hearing before the Honorable Dave W. Ling, Judge, United States District Court, at Phoenix, Arizona, presiding with a jury, commencing at the hour of 10:00 o'clock, a.m., on the 28th day of October, 1947.

The plaintiff was present and represented by her

attorneys, Messrs. Walter Linton and Harold Divelbess, of Messrs. Gust, Rosenfeld, Divelbess, Robi-
nette & Linton.

The defendant, Mary Boone Kendig, was present and represented by Messrs. Gene S. Cunningham and W. H. Messinger, of Messrs. Cunningham, Carson, Messinger & Carson.

The defendant, United States of America, was represented by Mr. Charles B. McAlister, Assistant United States Attorney.

The following proceedings were had:

The Clerk: Civil 863, Phoenix. Patsy O'Rourke Kendig, plaintiff, versus Mary Boone Kendig and the United States of America. The case is for trial.

The Court: Ready?

Mr. Linton: The plaintiff is ready.

Mr. Cunningham: The defendant, Mary Boone Kendig, is ready, if the Court please.

Mr. McAlister: The defendant, United States, is ready, your Honor.

The Court: Call the names of 18 jurors. As your names are called, come forward.

(Thereupon 18 jurors were called, examined on their voir dire by the Court and counsel, after which 12 jurors were selected to preside during the trial after being first duly sworn.)

The Court: You may proceed, gentlemen.

Mr. Linton: May it please the Court, and ladies and gentlemen, at this time I will read you the complaint in this action, omitting the caption which you have heard before.

(Thereupon the complaint was read to the jury by Mr. Linton.) [2*]

Mr. Cunningham: May it please the Court, I will read the answer of the defendant, Mary Boone Kendig.

(Thereupon the answer of the defendant Mary Boone Kendig was read to the jury by Mr. Cunningham.)

Mr. McAlister: Gentlemen, I will read the answer of the United States on the complaint that was filed.

(Thereupon the answer of the defendant United States of America was read to the jury by Mr. McAlister.)

The Court: Do you wish to make an opening statement?

Mr. Linton: I do, your Honor.

The Court: All right.

Mr. Linton: May it please the Court, and ladies and gentlemen of the jury, I want to make a brief statement generally on what the evidence of the plaintiff in this case will prove.

The complaint has been read to you and the answer has been read.

At this time I want to give you the facts on the allegations in the plaintiff's complaint, and the facts which we intend to prove.

Our evidence will show that Wiley Kendig and Patsy O'Rourke had gone together as sweethearts

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

some time before the war; they were college sweet-hearts at Tempe. He went into the Service in about 1941 and was a Naval flyer. He was a Lieutenant Junior Grade at the time of his death. In '43, in November, he came to [3] Phoenix and he and Patsy O'Rourke were married. At that time they went back to where he was stationed, I believe in Norfolk, and that he was killed on March 23rd, 1944, about four months after their marriage.

As I stated in the complaint, a child was born in November, 1944. Our evidence will show that, and as some of you know, a confidential report of flyers is filed with the Commanding Officer. Our evidence will show a confidential report was filed before the marriage, which said the beneficiary was his mother: "Are you satisfied with the beneficiary?" The answer is, "No." We will also show that shortly after their marriage; in fact, in January, 1944, the deceased had a crash in an airplane, but miraculously escaped without anything more than minor scratches. Prior to that time our evidence will show that he discussed with his wife that he was intending to immediately change the beneficiary to his wife, and that this air crash brought the realization to him that such things did happen, and that shortly thereafter he told his wife he made a change of beneficiary, and informed his wife that same day that he had sent in the forms to the Government to change the beneficiary to his wife, Patsy O'Rourke Kendig.

Our evidence will further show that a few days before his death, his brother George Kendig, his

younger brother, who was stationed somewhere over in Atlantic City, somewhere in New York, came down one day to visit him and he had not seen him for some time, and our evidence will show that he told his own brother that day, the son of the defendant, that he had sent in a change of beneficiary form to the Government to change the beneficiary from his mother to Patsy O'Rourke Kendig.

Our evidence will further show that there was considerable trouble—probably still is confusion—in the Veterans Administration National Service Life Insurance Department, that Wiley Sorrell Kendig did everything in his power to change the beneficiary to his wife. For some reason those forms cannot be located, but our evidence will further show that there was a confidential report which was opened by the Commanding Officer in the presence of his wife two days after his death. In that report it said: "Who is the beneficiary of your National Service Life Insurance?" And it said, "Patsy O'Rourke Kendig, Wife."

That, ladies and gentlemen, will be the main issues of the case, that he sent in a form to the Government, that he made that statement immediately thereafter to his wife that he had sent the change of beneficiary form; that the first time upon seeing his brother after that, he told his brother, "I sent in the form [5] changing the beneficiary from my mother to my wife," which the brother will testify to, and that on the confidential report it showed that the beneficiary was Patsy O'Rourke

Kendig, and that, ladies and gentlemen, will be the evidence given you by the plaintiff in this case.

Mr. Cunningham: If the Court pleases, could the defendant, Mary Kendig, be permitted to reserve a statement until the close of her case?

Mr. McAlister: The same for the defendant, United States Government.

The Court: Yes. Call your first witness.

PATSY O'ROURKE KENDIG

was called as a witness in her own behalf, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Linton:

Q. Will you state your name to the jury?

A. Patricia O'Rourke Kendig.

Q. And you are the plaintiff in this suit?

A. I am.

Q. You are a widow? A. I am.

Q. In other words, you have not remarried? [6]

A. I have not.

Q. And you are the widow of Wiley SoRelle Kendig? A. I am.

Q. And Wiley SoRelle Kendig is now deceased?

A. He is.

Q. When did you first know Wiley?

A. We met October 9th, 1939, shortly after I went to Tempe to school.

Q. And where was he at that time?

A. He was in school at Tempe.

Q. Did you see him often after that date?

(Testimony of Patsy O'Rourke Kendig.)

A. Practically constantly.

Q. Do you know of your own knowledge when he went into the Service?

A. Yes, it was around July 15th, 1941, before Pearl Harbor.

Q. Had he finished his college education?

A. He had, yes, just prior to that.

Q. And when did you graduate?

A. I didn't.

Q. Were you a freshman in college when you first met him?

A. Yes, I was.

Q. Did you see him often after he went into the Service in 1941?

A. Only on his leaves. I think they were about every six months.

Q. Did you have any correspondence with him while he was gone?

A. At times. Most of the time. I still retain such correspondence.

Q. And do you know of your own knowledge where he was located from 1941 until, say, November, 1943?

A. For about three months of his primary training he was in Long Beach and then he was sent first to Miami, I believe, and then to Norfolk, where he entered fighter training, and shortly after that he didn't go on for fighter training, he became an instructor at Jacksonville, and in November of 1942, I believe, he was transferred to Cuba as a patrol—in a patrol squadron, and he was there for 13 months.

(Testimony of Patsy O'Rourke Kendig.)

Q. Did he get home any time while he was in Cuba?

A. No, he was there all the time. I only saw him on his transfer from Cuba to Norfolk. He came to Phoenix and we were married and we went to Norfolk.

Q. When was the date of your marriage?

A. November 29th, 1943.

Q. And was that here in Phoenix?

A. Yes.

Q. Then from here you say you left for Norfolk?

A. Yes.

Q. How long were you in Norfolk? [8]

A. We were there one month.

Q. And where did you go from Norfolk?

A. We were transferred to Atlantic City.

Q. Then you went to Atlantic City about the first of the year, 1944?

A. Yes, it was January 1st, to be exact, 1st or 2nd.

Q. What was his rate in the Navy at the time you married him, do you remember?

A. Lieutenant, Junior Grade.

Q. And he was a flyer? A. Yes.

Q. Was his brother also in the Navy, his younger brother George?

A. Yes, George was a Midshipman at the time he talked to Wiley prior to his being commissioned as an Ensign.

Q. When you went to Atlantic City where was George stationed?

(Testimony of Patsy O'Rourke Kendig.)

A. George was at Ithica at Cornell University.

Q. I understand George was younger than Wiley? A. Yes.

Q. Approximately how much younger?

A. Oh, let's see, three or four years, I believe.

Q. Now, prior to January, 1944, between the date of your marriage in November and January, 1944, did you have any discussion with your husband regarding [9] National Service Life Insurance? A. Prior to January?

Q. Yes.

A. Only slightly—only slightly. We were to be transferred soon, and at one time he said, "Well, I am going—I must get my papers all cleared up before I go out." At that time that is what he stated.

Q. That was before January? A. Yes.

Q. Now, did anything happen in the month of January, unusual, in his training?

A. January 5th he had a terrible crash, mid-air collision. Both of the boys came out of it fine, and, oh, approximately a week after that, he made the statement again, well——

Mr. Cunningham: Just a moment, we object to that as hearsay, if the Court please.

Mr. Divelbess: Your Honor, if you have any doubt in mind about the admissibility of this, we would like to argue on the matter.

The Court: Oh, I think it is admissible.

Mr. Cunningham: May I have the Court's ruling?

(Testimony of Patsy O'Rourke Kendig.)

The Court: She may answer.

A. He had this crash and he said, well, something to the effect that, "Well, I guess it could happen to me." He was very confident in his flying and he felt [10] just as sure, I guess, as everybody else, that nothing was going to happen. He was never a bit afraid of flying, and this crash, I believe, certainly had—well, I wouldn't say it frightened him exactly——

Mr. Cunningham: I object, that is merely a conclusion of the witness.

The Court: Yes.

Mr. Linton: Yes.

The Court: That is not material.

A. He said he was going to change it right away, though.

Mr. Cunningham: We move to strike that for the reason it is hearsay.

The Court: Yes, that is a voluntary statement.

Mr. Cunningham: We move to strike it.

The Court: All right, it may be stricken.

Q. (By Mr. Linton): Patsy, do you know from any conversation that you may have had during the month of January or February whether or not the beneficiary on this life insurance policy had been changed? A. He came to me——

Mr. Cunningham: Just a moment, please—excuse me. May I have that read?

(The question was read by the reporter.)

Mr. Cunningham: I withdraw the objection.

(Testimony of Patsy O'Rourke Kendig.)

The Witness: He stated—he came to me and made [11] the statement to me——

Mr. Cunningham: No, the question was did you have any discussion.

Q. (By Mr. Linton): Did you have any discussion? A. Yes, yes.

Q. You had some discussion with Wiley about that change? A. I did.

Q. Do you know when that was?

A. Well, it was in latter January.

Q. When you were in Atlantic City?

A. Yes.

Q. Do you know whether or not the beneficiary on the policy was changed at that time?

A. From—only from what he said.

Q. Will you state the conversation?

Mr. Cunningham: Now, we object to it as calling for hearsay, if the Court please.

The Court: She may answer.

A. He stated—he came to me and he stated, “I have changed”—“that the insurance has been changed, I have made the change. Everything is settled.”

Mr. Cunningham: I move to strike it, if the Court please, on the ground it is hearsay.

The Court: It may stand.

Mr. Cunningham: May I request that exceptions be [12] preserved?

The Court: It is not required under the new rules.

Q. (By Mr. Linton): Did you ever see the

(Testimony of Patsy O'Rourke Kendig.)

beneficiary form at any time he was talking about it? A. No, I didn't.

Q. Did Wiley, to your knowledge, at any time during his service with the Government, have any clerical positions?

A. Yes, most of the officers, I believe, that do become officers, are given certain desks——

Mr. Cunningham: If the Court please, we object to that as not responsive to the question.

The Court: Yes, it may be stricken.

Mr. Linton: Will you read the question?

(The question was read by the reporter.)

The Witness: Yes.

Q. Do you know of your own knowledge what that consisted of?

A. Yes, he worked on the books in Ship Service in Cuba.

Q. Do you know of your own knowledge whether or not he had any clerical position requiring him to be familiar with the National Service Life Insurance? A. I do not.

Q. Now, after your marriage to Wiley, when was the first time you saw George Kendig? [13]

A. George accompanied me home with Wiley's father.

Q. You had not seen him, then, until November, until after the crash? A. No, I had not.

Q. Do you know whether or not, of your own knowledge, whether Wiley and George had seen each other from the time of your marriage until the date of Wiley's death? A. Yes.

(Testimony of Patsy O'Rourke Kendig.)

Q. Do you know where that was?

A. Atlantic City.

Q. Do you know approximately the date?

A. Yes, I know exactly the date, March 11th.

Q. Were you there at that time?

A. I was not.

Q. And where were you?

A. I had gone and spent the weekend with friends in Philadelphia.

Q. Then, as I gather it, George spent the weekend with Wiley? A. Wiley, alone, yes.

Q. Patsy, where was this crash in which Wiley was killed? A. Near Tuckahoe, New Jersey.

Q. And he was killed as a result of an airplane crash? A. Yes. [14]

Q. And what was that date?

A. March 23rd, 1944.

Q. Did you at any time thereafter have occasion to check the records or check with the Commanding Officer of the Base there regarding Wiley's death and his papers, or anything of that nature?

A. Yes, we discussed them.

Q. Will you relate generally what you learned?

Mr. Cunningham: Just a moment, please. I don't want to stop you until you finish your question.

Mr. Linton: Go ahead.

A. I——

Mr. Cunningham: Just a moment, please. Have you finished your question?

Mr. Linton: Yes.

(Testimony of Patsy O'Rourke Kendig.)

Mr. Cunningham: If the Court please, I object to that as calling for hearsay.

The Court: She may answer.

A. I learned, first, that the widow of a deceased Naval veteran was the natural beneficiary to his six months—well, they call it “death gratuity,” six months death gratuity. That is the regular continuation of their pay for six months, that I would receive any and all funds that he had left in his account. They had a regular account where they drew out their salary, and they could leave it in a sort of a bank account [15] until they wished to use it. I learned that I would receive that just naturally, and that on my question to the Commanding Officer as to what condition the life insurance was in, was that taken care of, he said——

Mr. Cunningham: Just a moment, please. I object to the answer, to this portion of it as relating to hearsay testimony. She is now going from what she learned to relating what was stated to her by some person.

The Witness: Well, he made the statement.

The Court: Just a minute. Did you see any of his papers that contained that statement? Did you read his confidential report?

A. Yes, he showed me the confidential report.

Q. What did that say about life insurance benefits?

A. It said—well, to the question which said, “Do you have insurance?” he said, “Yes.” “With which Company?” or approximately that. He said, “Government.” It says “beneficiary?”—“wife.”

(Testimony of Patsy O'Rourke Kendig.)

Q. (By Mr. Linton): Do you recall, in seeing that report, whether or not it was dated—do you recall whether that report was dated?

A. I don't remember.

Q. And when was the conversation, and when was the time that you saw the confidential report?

A. It was March 25th, two days after Wiley was killed. [16]

Q. Where was that located?

A. In the Commanding Officer's office at Atlantic City.

Q. What was the name of the field?

A. Pomona, yes, they call it Pomona.

The Court: We will have a brief recess at this time. During the recess, you are not to discuss this case among yourselves or permit anyone to discuss it with you, also avoid forming or expressing any opinion upon any subject connected with it.

(Thereupon a short recess was taken.)

PATRICIA O'ROURKE KENDIG

resumed the witness stand and testified further as follows:

Mr. Linton: You may cross-examine.

Mr. Cunningham: No cross-examination, if the Court please.

Mr. McAlister: I believe I would like to ask some questions—(conferring inaudibly with counsel)—no questions.

The Court: That will be all.

(The witness was excused.)

Mr. Linton: At this time I would like to offer in evidence the deposition of George Kendig.

Mr. Cunningham: We have no objection to it going into the record, except pursuant to the agreement under [17] which it was taken, that in the reading of it we will be permitted to make such objections to questions as they are propounded, and answers, as we go along. Do you see any objection to that?

Mr. McAllister: No.

Mr. Cunningham: If the Court please, the deposition is preceded by the usual agreement, that the objections may be reserved until introduction.

The Court: All right.

(The document was received as Plaintiff's Exhibit No. 1 in evidence.)

Mr. Divelbess: I will take the stand and let Mr. Linton propound the questions to me and you can make your objections.

Mr. Cunningham: Either way, it is all right.

(The following is Plaintiff's Exhibit 1 admitted in evidence, being the deposition of George Kendig, taken on the 24th day of September, 1947, before L. W. McCreight, a Notary Public in and for Dallas County, Texas, at Dallas, Texas:)

"Agreement. It is further agreed by and between the parties hereto through the attorneys appearing herein that any and all objections as to any questions or answers contained herein may be

made upon the offering of this deposition in evidence upon the trial of this cause with the same force and effect as [18] through the witness were present in person and testifying from the witness stand.

“GEORGE KENDIG,

the witness named in the caption hereof, being first duly cautioned and sworn, testified as follows:

Direct Examination

By Mr. Churchill:

Q. Would you state your full name please?

A. George Kendig. (Spelling) K-e-n-d-i-g.

Q. How old are you? A. Twenty-five.

Q. You are married? A. I am.

Q. What is your wife's name?

A. Johnnie A. Kendig. Do you want it full?

Q. Yes. A. Anderson.

Q. Where do you live?

A. 2823 Hawthorne.

Q. That is here in Dallas? A. Yes.

Q. What do you do here in Dallas?

A. I am a dental student, Baylor Dental College.

Q. Were you in the Service during the recent war? A. I was. [19]

Q. In what branch? A. Navy.

Q. Was your brother Wiley Sorrell Kendig, was he in the Navy also? A. He was.

Q. Where were you stationed when you were in the Navy?

(Deposition of George Kendig.)

A. Do you want a list of the various stations?

Q. Were you stationed at Atlantic City?

A. I was not.

Q. Were you there at any time?

A. I was, to visit him.

Q. Your brother was stationed there?

A. Yes, he was.

Q. You visited with him there?

A. That is true.

Q. And you talked to him? A. Yes.

Q. Did you discuss with him or did he discuss with you his government life insurance?

A. It was not a topic of discussion. It was made just a point in the conversation. I wouldn't say it was a topic of conversation.

Q. But did he mention it?

A. It was mentioned during the course of the conversation. [20]

Q. But he did say something about it?

A. Yes.

Q. Would you briefly state what he mentioned about the life insurance?"

Mr. Cunningham: I object to that, if the Court please, that is objectionable on the ground it is hearsay.

The Court: He may answer.

Mr. Linton: Do you want to read the objection?

Mr. Cunningham: I wasn't really depending on that. I made the original objection and the Court overruled it.

(Deposition of George Kendig.)

“A. I am not sure any more than you are of remembering what was said three years ago. Maybe you can, but I can't. I can state what is on that affidavit, if you would like I will read it off.

Q. What did you say during that conversation, if you remember?

A. I will read it off the affidavit if that is all right. I can't remember it. My mind isn't that sufficient and I think it would be much more appropriate if I would just read it. That certainly is more pertinent than what I say now because it was two years since I made the affidavit. That sounds logical to me. I don't know whether it is to you or not.

Mr. Churchill: I was just wondering if it would be [21] all right for him to read it?”

Mr. Cunningham: Yes. I don't know whether the Court would permit it or not. I'd say “yes” quickly, but if you will explain to the Court what it is.

Mr. Linton: There is a conversation between counsel during the taking of this deposition. If it is agreeable we can leave most of that out.

Mr. Cunningham: I think so, because I do not make any objection that we can rely on at this time.

The Court: All right.

“Q. Can you state about what he said during the conversation?

A. I just read the affidavit. If I remember correctly I made some statement to the effect that he

(Deposition of George Kendig.)

Q. That statement is so much better, the affidavit; why not let me read it? I will let it refresh my memory. I don't think that is out of the question."

Mr. Linton: Then will you read the answer on Line 7? I think that is still a part of the answer.

"A. The best I remember is what is on that affidavit.

Q. Well, can you just say that?

A. If I can see the affidavit.

Mr. Churchill: I think the other attorney would object to it. A. Do you object? [22]

Mr. Seay: Yes, we object."

Mr. Linton: Read the next line, 14.

"All I have to say is I don't remember anything I said.

Q. Shortly after you talked to your brother there in Atlantic City—that was about in 1944?

A. Yes, about.

Q. And then shortly after that he was killed?

A. That is correct.

Q. How was he killed?

A. In a plane crash.

Q. After that do you know who was receiving the proceeds of his insurance policy?

A. I don't know when I was informed of that. I was informed of that by my wife while I was overseas.

Q. What were you informed?

A. That my mother was receiving the benefits from the National Life Insurance policy.

(Deposition of George Kendig.)

Q. Was that sort of a surprise to you that she was receiving the proceeds?

A. In view of the conversation, yes.

Q. What was the conversation?

A. The conversation with my brother.

Q. What did he say then?"

Mr. Cunningham: We object to that, if the Court please, calling for hearsay. [23]

The Court: He may answer.

"Q. What did he say?

A. He objects to letting me have the statement. I hope I can reduplicate it but I will say it was his intention to submit some form of notification to the National Life Insurance Company to the effect of the change of the beneficiary.

Q. From whom?

A. From his mother Mary Sorrell Kendig to his wife Patsy O'Rourke Kendig. Does that sound like the affidavit?

Q. Well, he stated to you in that conversation that he had an intention of filing this change of beneficiary?

A. No. I had better say he said, "I sent in a form to change the beneficiary", and his intentions with that form was to change the beneficiary. It was the purpose of the form. Does that sound better?

Mr. Churchill: I believe that's all.

Cross-Examination

Mr. Seay:

Q. Mr. Kendig, was your brother Wiley Sorrell

(Deposition of George Kendig.)

Kendig older or younger than you? A. Older.

Q. How much older than you was he? [24]

A. 3 years and 7 months if I figure it correctly.

Q. About how old would that make him when he was killed?

A. I think he was 24 when he was killed; his birthday was in March.

Q. Had he been in the Navy long?

A. Since 1941.

Q. What was his rank in the Navy?

A. Lieutenant J. G., Lieutenant Junior Grade.

Q. He was commissioned a Naval Officer?

A. Yes, sir.

Q. Did he have wings? A. He did.

Q. He was a Naval pilot? A. Yes.

Q. Where had he gone to school?

A. Arizona State College, Phoenix, Arizona.

Q. Did he specialize in any particular type of study or was it a B.A. degree?

A. It was a Bachelor of Arts. I don't know whether he majored—I think he majored in geology.

Q. He did get a degree in that college?

A. Yes, he did.

Q. As a matter of fact to be a Naval Officer you have got to have a degree from some college?

A. No, that is incorrect. They took them in the [25] last part of the war, they took them with two years of college.

Q. Before you can become an officer you have to go through a course and qualify. Certainly in a pilot's school you have to take a training course?

(Deposition of George Kendig.)

A. I think it applies to all courses.

Q. After he graduated from this college had your brother taken any further post graduate work in schools of any kind before applying to the Navy?

A. No. He entered the Navy soon after he received his degree.

Q. Did he do any work that you remember after he got his degree?

A. Well, only in so far as his college training—I mean he didn't enter any occupation of any kind.

Q. He didn't enter any business? A. No.

Q. Had he done any work along in the college?

A. Yes, he had at least partial support by working at what was called a Varsity Inn, a place where the students hang out.

Q. In the Navy did he have any particular occupation before he got through the pilot school?

A. No, he entered in the pilot training and emerged a pilot and carried on as a pilot after that.

Q. In the Army Air Corps it takes the pilot something [26] like 9 weeks of pre-flight and nine weeks of primary and nine weeks of basic and nine weeks of advanced, that is 36 weeks and ten more even before they get their wings and after they get their wings they take some patrol training, maybe transition training on heavy type aircraft and then they take a specialized combat course and of course went on the aircraft carriers so it would take him—

A. 13 months of training, that is correct.

A. And he was a regular Naval pilot?

A. Reserve Naval pilot.

(Deposition of George Kendig.)

Q. He had gone through all that training and been stationed at bases after getting his wings?

A. Uh-huh.

Q. You saw him you say up there at——

A. ——at Atlantic City.

Q. ——at Atlantic City. By the way, what was your position in the Navy? A. Ensign.

Q. Were you a line officer? A. Yes.

Q. Were you commissioned at the time you saw him? A. Yes, I was. I was on duty.

Q. Were you down there on just a short visit?

A. That's correct, very short. I don't think I visited with him over one day. [27]

Q. Did you hop a ride down there?

A. Yes, I went down to see him.

Q. Did you get a ride on a Navy plane?

A. No, I didn't.

Q. You just went down to the base?

A. Uh-huh.

Q. Were you married at the time?

A. No, I was not.

Q. Of course, this time that you saw him sometime in 1944 had been a long time ago, hasn't it?

A. That is correct.

Q. And very naturally you can't remember exactly what was said?

A. I can't remember anything that was said and I wouldn't say that because I did make some statement.

Q. As a matter of fact, you can't say positively anything that was said on that occasion?

(Deposition of George Kendig.)

A. No, not now, I couldn't.

Q. In other words, your mind is blank on it?

A. Well, not blank, no. I still have facility to remember three years ago. I can remember when I was a child. It certainly isn't a blank.

Q. Sure, but as to exact words?

A. Exact words is correct.

Q. And of course, what independent recollection you have of it now is solely based on your discussion with [28] Mr. Churchill prior to this deposition?

A. I would say refreshed prior to reading the affidavit.

Q. Before you came into the deposition you did read some affidavit you mentioned, is that correct?

A. Not before; I had that after I got here?

Q. After you got in the office where we are taking the deposition you did read the affidavit?

A. Yes, I did. Is that contrary to anything, Mr. Churchill?

Q. You are not asking Mr. Churchill to tell you what to say, are you?

A. No. I just want to know what he said.

Q. You don't want to do anything to hurt his feelings but are you relying on him to tell you what to say up here in the hearing?

A. I can make a short answer: No.

Q. Mr. Kendig, you don't profess to be able to say what is in another man's mind, do you?

A. No, I am not capable of that.

Q. Don't you know none of us can say what is in another man's mind, frankly?

(Deposition of George Kendig.)

A. I am not capable. Perhaps you are.

Q. I don't think I am either. Of course, I am asking you as a witness under oath.

A. I made the statement "No." [29]

Q. You would not attempt to testify what was in another man's mind, would you?

A. No. Would you?

Q. In your studies in the Navy you learned through your contact with the Navy that the armed forces of the United States had a death gratuity for relatives of people killed in the Service?

A. Would you be more explicit?

Q. You know about the death gratuity is six months pay after a man being in the Service is killed, his dependents or beneficiaries are advanced six months of his base pay including his flying pay and longevity that he would get as subsistence?

A. Yes, I think I have heard it.

Q. That and the base pay; you remember that that is a benefit which a man is entitled to from being in the Service. You knew about that, in the Service, the enlisted man?

A. Yes, the base pay.

Q. Six months advanced base pay after his death, did you know about that? A. Yes.

Q. What I mean is on a man's death did you know that he was entitled to get six months' advance pay? A. Yes, I did.

Q. Did you know that some time in 1944 your brother [30] Wiley Sorrell Kendig changed this

(Deposition of George Kendig.)

death gratuity from his mother to his wife? Did you know about that? A. No, I didn't.

Q. You yourself never saw any written letter or written instrument of any kind pertaining to any beneficiary of your brother, did you?

A. No, I didn't.

Q. Of course, you are not testifying that any such instrument was posted in the United States mails or by the Army base, you know nothing about that? A. Nothing about that.

Q. All that you know and now recall is what you have testified on direct examination as to your impression as to what Wiley Sorrell Kendig's intention was?

A. No. That is incorrect. I can testify to the statement he made to me to the effect that he had sent in a change of beneficiary from his mother to his wife, sent that form in to the National Insurance Agency or whatever the agency is.

Q. You say, "Whatever it is." What do you mean by National Insurance Agency?

Mr. Churchill: Do you mean the National Life Service?

A. Yes.

Q. (By Mr. Seay): On Mr. Churchill's suggestion you now testify National Service? [31]

A. Not Mr. Churchill's suggestion. The reason I didn't say it correctly is I am not sure what the correct name of it is. I am not sure and if you are sure I would like to be enlightened on it.

Q. As far as you are concerned you don't re-

(Deposition of George Kendig.)

member what agency was mentioned at the time, do you?

A. Yes, the agency with which he and I both and every man in the Armed Forces had a policy which it is, I think it is the National Life Insurance something, I don't know, Agency. I maintained the same policy. I had the same policy.

Q. Well, your policy wasn't mentioned in the conversation? A. No, sir.

Q. And as to any form that you talked about, you never saw any form and don't know what form was being referred, do you?

A. Only in that there was a special form which is called a change of beneficiary form with which you are supposed to change your beneficiary, and I assume that is what he meant. I can't say what it was, as you say, I never saw any instrument to that effect.

Q. And you, as a matter of fact, don't know whether the reference was to the form for this death gratuity?

A. I certainly do. He said his policy with the National Life Company. [32]

Q. Now, you are repeating something. You say "he said." You didn't say that at first on your direct examination. You said you couldn't repeat it.

A. You are confusing. Will you make that statement over again?

Q. I asked you if you said that on direct examination as to his exact words. You are now quoting

(Deposition of George Kendig.)

some exact words. Is that what you are now doing? Are you quoting the exact words, or is that your impression?

A. I repeat, on meeting my brother some time in 1944 during the course of the conversation my brother made the statement he had sent in a form to change his life insurance policy with the National Life Insurance Company or Agency, I might as well make it that because I am not sure, from his mother Mary Sorrell Kendig to his wife Patricia O'Rourke Kendig, unquote.

Q. Where were you when that conversation took place?

A. Riding in a 1942 Chevrolet in some street in Atlantic City.

Q. What makes you place that so positive as to where you were?

A. I made the statement where I was. I don't know what makes me remember that. You asked me a statement and I gave you all a correct answer.

Q. You say you couldn't remember exactly what was said but you do remember exactly where it was said, is [33] that right?

A. I can't remember the exact words, that is correct, but I can't remember the streets either.

Q. As far as your memory goes at this time you could have said, "I am going to send it?"

A. No, I couldn't; he said, "I did."

Q. Now, you are positive about that, although you have been telling us you can't remember it?

(Deposition of George Kendig.)

A. Those aren't his exact words.

Q. That was your impression?

A. No, it wasn't an expression. It was a statement.

Q. Of course, nothing was said about when that was done, was there? A. Certainly not.

Q. Nothing was said about where he was when he did it? A. No.

Q. And nothing was said about whether he made it out or somebody else made it out?

A. He said, "I." "I sent the form in." He used the first person.

Q. He said "I sent?"

A. That's correct, he said, "I sent."

Q. He didn't say, "I made it out," or anything like that?

A. I can't remember the exact words. [34]

Q. So when you can't remember exactly; it is very possible he said he was doing it, isn't it?

A. No, he said, "I sent," or to that effect. No, I will leave it he said, "I sent."

Q. You are now remembering the exact words?

A. Yes, sir.

Q. Those two? A. I will testify to that.

Q. "I sent"? A. Uh-huh.

Q. But you don't want to testify to any other words after this long period of time now, do you?

A. Must I repeat it again?

Q. You don't have to ask Churchill for your answers.

A. I wasn't talking to Mr. Churchill.

(Deposition of George Kendig.)

Q. You were looking right at him. You pointed at him.

A. Did I address him or did I say Mr. Churchill?

Q. It looked like to me you did.

A. Did I?

Q. You didn't say Mr. Churchill, but you pointed at him and asked him the question.

A. Nevertheless, I could have been pointing at the wall.

Q. Maybe you were. How did you happen to be talking [35] about this subject?

A. I repeat again in the course of the conversation the subject arose.

Q. You don't know how you happened to be talking about it? You didn't ask him this specific question, did you?

A. No, in the course of the conversation the subject arose.

Q. You don't remember any of the other conversation? A. No.

Q. You won't testify as to any other conversation you had with him at the time?

A. No.

Q. Either before or after— A. No.

Q. —this conversation. This form or paper referred to you yourself don't know what was in it, do you?

A. You will have to be more explicit.

Q. You said something about your brother said something about a form. You don't know what was in the form because you never saw it?

(Deposition of George Kendig.)

A. I never saw the instrument, that's correct. We discussed that previously.

Q. You don't know actually that there was any such form, do you? Actually now you don't know?

A. Now, we are going back. Shall we go back to the instance of my brother? Shall we do that? My brother made the statement to me and trusting me and I will trust my brother and certainly I am not going to distrust him. I would have no reason to.

Mr. Fonville: What was the question in that connection?

(The question referred to was read by the reporter as follows: "You don't know actually that there was any such form, do you? Actually now you don't know?")

Q. (By Mr. Seay): There was nothing said about how any form was sent, was there?

A. He could have sent by pony express. I suppose, I don't know.

Q. There was nothing said about how it was sent, was there? A. No.

Q. By what means and what method, whether by pony express or what?

A. I certainly don't know. The natural assumption is always by mail, United States Mail.

Q. I am not asking you for your natural assumptions, of course. Have you been giving us your assumptions of those facts?

A. As a statement of fact, I think you implicate it.

(Deposition of George Kendig.)

Q. Of course, you don't want to testify anything was sent by U. S. Mail, do you? [37]

A. I certainly don't.

Q. There was no statement made to that effect whatsoever?

A. The answer is again "no."

Q. There wasn't any more discussion about that other than in the course of the conversation this came up and you told us all that was said?

A. That is correct.

Q. And you don't recall that positively, do you, except the words, "I sent"?

A. I made a statement of fact and I will repeat the statement of fact if necessary.

Q. Well, do you now want to say when you told us you couldn't recall exactly, do you want to say you do recall exactly and positively?

A. Naturally not. I said I can't recall the exact words and I repeat I can't recall the exact words of the entire conversation; I can't recall the exact words. I can't recall the street we were riding on.

Q. You recall nothing else about the particular transaction? A. Pardon?

Q. You recall nothing else about it, about this particular transaction?

A. What do you mean, "Nothing else?"

Q. Other than what you have already told us?

A. That's right. I am making a deposition on that affidavit. Is that not correct?

Q. Making what?

(Deposition of George Kendig.)

A. A deposition on the affidavit. Is that not correct?

Q. You mean you are just repeating now what you recall what in an affidavit that you looked at?

A. No. I understood I was to appear this afternoon at five o'clock and make a deposition on an affidavit. Am I correct?"

Mr. Cunningham: I would like at this point, if the Court please, to reserve, and I think to save time at this point, where the answer is: "No, I understood I was to appear this afternoon at five o'clock and make a deposition on an affidavit——" and again in the four lines ahead of it—"That's right. I am making a deposition on that affidavit." May I reserve the right to make my objection at the close of this deposition when I will again point your Honor's attention to that? I have a motion to make and it will save time.

The Court: All right.

"Q. Were you served with a subpoena?

A. I was not served with a subpoena, no.

Q. Did somebody tell you to appear here and give your deposition on an affidavit?

A. That's right. Mr. Churchill—— [39]

Mr. Churchill: I don't believe I said——

Q. (By Mr. Seay): That is what you understood you were doing?

A. Yes, that is correct.

Q. The affidavit you have reference to is some——

(Deposition of George Kendig.)

A. The purpose of my being here was to make a deposition on an affidavit. It was the purpose of my presence here.

Q. And so what you have given us in this testimony is based on that purpose?

A. Yes. That is my main purpose to give my deposition on the affidavit, my main and only purpose.

Q. Did you say you were attending school here?

A. That is correct.

Q. Where are you going?

A. Baylor Dental School.

Q. Are you now a resident of Dallas or here just taking that course?

A. Well, what differentiates residence from a non-residence?

Q. I am not trying to be technical with you. What I want to know is where you say you live. Where is your home?

A. I reside in or board out here at 2823 Hawthorne.

Q. Do you consider yourself a Texan——

A. I was born—— [40]

Q. ——or Arizonian?

A. I was born in Escondido, California, September 21, 1922.

Q. Are you a Californian? All I want to know is where you call your home, your permanent address.

A. I would rather not make that statement. Do I have to?

(Deposition of George Kendig.)

Q. No, if you want to refuse.

A. I don't think it is pertinent. I don't think I will answer it.

Q. All right. You then refuse to answer it.

A. Is it possible to get a drink of water?

Mr. Seay: That is all right with me. Let's adjourn a minute.

(At this time a short recess was taken.)

Mr. Seay: That is all.

Cross-Examination

By Mr. Fonville:

Q. Mr. Kendig, did I correctly understand you on direct examination to testify you had no independent recollection of the conversation?

A. Will you clarify that? I perhaps understood you but don't understand your statement.

Q. What I mean by that, I will say this, did I understand you to testify on direct examination you [41] had no other recollection of the conversation?

A. If I made the statement naturally it is entered.

Q. Maybe you didn't understand my question. I don't think I quite finished. Let me repeat it. I stated that I understood on direct examination you testified that except as it appears in the affidavit, in other words by reading the affidavit you have now no independent recollection of the conversation——

A. I am not sure.

Q. ——I didn't finish my question. Did I correctly understand you?

(Deposition of George Kendig.)

A. You want a correct answer on it?

Q. Yes. Maybe I am mistaken.

A. Well, it could be proven by this little document here, I suppose.

Q. I don't think you understood me.

A. You said did I understand you——

Q. You mean the reporter's notes?

A. Yes.

Q. It will take time to refer back to it. That is the reason I asked you.

A. I imagine I might say it.

Q. Will you go back to the direct examination, the latter part and advise me whether your notes show the witness, in answer to the question as to a conversation with his brother, what answer he made to that. There [42] were several questions and answers and I wish you would read that passage.

Mr. Seay: Mr. McCreight, I might suggest that it was covered on direct examination.

A. Let me ask a question, what is direct examination?

Mr. Fonville: That is the first one.

A. And the rest is superfluous?

Mr. Fonville: The first is direct examination and the other examinations are called cross.

(The direct examination beginning with Page 6, Line 22, and ending with Page 8, Line 1, was read by the Notary.)

Q. (By Mr. Fonville): Do you have an inde-

(Deposition of George Kendig.)

pendent recollection of the conversation of which we have been talking about?

A. On direct examination as you say I made the statement "No."

Q. I will ask you, without reference to direct examination, affidavits, or any other instruments of any kind, do you now independently have any recollection of the conversation?

A. Upon refreshment may I ask you a question?

Q. If you will listen to my question, I think you can answer it. Let me ask it again: Do you now, at this time, independently of affidavits or any refreshment [43] of your memory, have any independent recollection of that conversation?

A. I must give a direct answer, either "yes" or "no"?

Q. I would like one. That is what my question is designed to ask, "yes" or "no." If you can't answer it "yes" or "no," you can so state.

A. Would you mind restating it after I ask a question of you?

Q. Yes, you can ask it.

A. Do you think it is possible for a person, without refreshing his memory, after two years, recall, we will say, recall pertinent happenings, recall those happenings?

Q. We are getting into a very interesting discussion but that is not the function of this examination. My question is: Independent of any refreshment of your recollection by that affidavit or otherwise, have you now, at this moment, an independent recollection of this conversation?

(Deposition of George Kendig.)

A. I will make the statement "No."

Q. During your examination on direct, I forget whether it was on direct or cross, I believe it was on cross——

A. In other words I said the words "I sent."

Q. Those you refer to specifically you remember. Will you repeat to me now what you repeated at that time? [44]

A. The thing I can't understand is if I made one statement——

Q. Will you answer my question?

A. You want me to make a statement and if I make this statement it will be in direct contradiction of the last statement I made.

Q. Are you concerned with the effect of your testimony?

A. No. I am concerned with the statement I make. I want to tell the truth.

Q. I just asked you a question. Would you repeat for us? A. Repeat what I said?

Q. Yes.

A. I told you, Mr. Seay, is that your name—that the words "I sent" I remembered. I remember the words "I sent" independent knowledge.

Q. Let me ask you that, are you quoting the affidavit to us?

A. I can't quote that affidavit.

Q. Are you attempting to quote that affidavit?

A. No, I am not attempting to quote the affidavit.

Q. Will you repeat in full what you recall of the conversation with your brother? A. Yes.

(Deposition of George Kendig.)

Q. Will you repeat it? [45]

A. Quote: While meeting with my brother in Atlantic City sometime in 1944—It may not be a good sentence—During the course of the conversation my brother made the statement I have sent in a form to change my life insurance policy—I will continue—Change my National Life Insurance policy from the beneficiary which is my mother Mary Sorrell Kendig to my present wife Patricia O'Rourke Kendig. Unquote.

Q. You began your statement there with quotation marks and ended it with quotation marks. Are you quoting your recollection of your affidavit?

A. No, that is myself. I made the statement.

Q. When you began with the quotation marks and ended with the quotation marks do you mean for us to understand that is a quotation from your brother?

A. No, I don't mean that. That is my quotation.

Q. Will you tell us as well as you recollect now the words that he used, as well as you recollect them? I realize it has been a long time but will you tell us as well as you recollect the words he used in telling us what you have told us in the answer to the last question?

A. I am confused, but I will make a statement. I sent in a form to the National Life Insurance Company to change the beneficiary of my policy from my mother Mary Sorrell Kendig to my wife Patsy O'Rourke Kendig, or probably I had better say Patricia. [46]

(Deposition of George Kendig.)

Q. His mother is also young, is she?

A. Yes.

Q. Is she your mother?

A. With my study of genetics and eugenics I think a person is only capable of having one mother. Maybe I may be wrong.

Q. You perhaps misunderstood me. Is she your natural mother or your stepmother? You could have a stepmother, I don't know, and that is the reason I asked it.

A. My mother.

Q. Mr. Kendig, whom did you first tell after that conversation that your brother had told you this?

A. Undoubtedly—No, wait a minute—Now you are making me—My wife, my wife.

Q. How came you to give an affidavit in the matter?

A. To express the wishes of my brother—No——

Q. You are giving me your reasons. If you will listen to my question you will find the particular answer I desire. My question is how came you, not your reasons?

A. That would certainly be a reason.

Q. All right. At whose request did you give the information?

A. Patsy O'Rourke Kendig.

Q. That is your brother's widow?

A. Yes, sir. [47]

Q. When did she request you to do that?

A. That, I can't answer; I don't know. She made a request.

(Deposition of George Kendig.)

Q. What did she ask you in respect to that?

A. I don't remember.

Q. When did she ask you?

A. I don't remember.

Q. How did she know, if you know, that you had any such information to include in an affidavit?

A. I don't remember that.

Q. Do you know? A. No, I don't know.

Q. This conversation with your brother in Atlantic City, what was the date of that conversation?

A. The exact date?

Q. The best you can do for us.

A. Oh, I will say February 15th, 1944.

Q. What time of day or night did it occur?

A. I don't remember.

Q. Would it be in the daytime?

A. I don't remember.

Q. If you don't remember whether it was in the daytime, do you recall it was night?

A. It would have to be one of the two.

Q. And you don't remember? A. Yes.

Q. And you were in an automobile at the time?

A. Yes.

Q. Who was driving? A. He was.

Q. Was it his automobile? A. It was.

Q. Where were you going?

A. Down a street in Atlantic City.

Q. I understand that, but your destination?

A. No destination.

Q. Where had you been?

A. No recollection of previous activities.

(Deposition of George Kendig.)

Q. How come the subject of the conversation of your brother's National Service Life Insurance policy?

A. I can't recall why it was brought up. It was in the course of the conversation.

Q. You can't recall any other point in the conversation? A. No.

Q. Are you interested in the outcome of this particular lawsuit?

A. I am certainly not interested in the outcome in any way. You can underscore that if you wish.

Mr. Fonville: I have no further questions. [49]

Redirect Examination

By Mr. Churchill:

Q. I will just ask you a couple or three questions, Mr. Kendig, in order to simplify maybe a few of the statements you made. In regard to the residence which you now have I don't know whether Mr. Seay meant domicile or residence. A residence means where you hang your hat.

A. That is what he asked; he asked where I was now residing.

Q. That means where you would hang your hat?

A. That's right.

Q. Domicile means something else, physically present where you make your home, but you are just residing at the place you stated before?

A. That's correct.

Q. Another question, in regard to the type of insurance which you had or your brother rather had,

(Deposition of George Kendig.)

now, we veterans call it flat G.I. insurance. That is what you were receiving? A. Yes.

Q. The common name of the G.I. insurance?

A. I said it was identical to that type of insurance I had.

Q. And you had just the plain G.I. insurance?

A. That's right. [50]

Q. Now, in regard to this when you were talking about we were going to take a deposition on your affidavit this afternoon?

A. Yes, sir. In the first place I don't know the connotation of depositions.

Q. A deposition is what we are doing now, just a lot of questions and you know there is a lot more to it than was in the affidavit. You are giving your answers on direct and cross examination?

A. I realize that now.

Q. Did you have the impression when you came down here that you were just supposed to memorize an affidavit, just recite it? A. No.

Q. You knew that you were just going to be asked questions regarding your brother?

A. I think I asked you what a deposition was and you furnished the information it was to determine my character, not character, no, determine who I am possibly, I think you said that.

Q. That is part of the deposition.

A. You also said something about confirming that I made that deposition.

Q. The statement?

A. Confirm the statements in the deposition.

(Deposition of George Kendig.)

Q. Just to see if you remember things that had been [51] said by your brother to you?

A. No, I don't think you said that.

Q. Now, in regard to what Mr. Fonville asked you about independent recollection, in other words, do you remember what your brother said to you?

Mr. Seay: Just a minute. We object to counsel going back over the testimony in such away as to put the words in the witness's mouth as to what he wants him to testify. We think that is a conclusion and suggestion and if you have any direct questions I won't object to it.

Mr. Churchill: I was trying to clarify the question; that was confusing at the time. He was using technical words.

Mr. Seay: You can ask him the question what his independent recollection is."

Mr. Cunningham: Just a minute. We object to it as leading.

The Court: You what?

Mr. Cunningham: I say, we won't insist on that.

"A. I asked you, Mr. Fonville, what the definition of it was.

Q. (By Mr. Churchill): What was your understanding, independent recollection, about?

A. Independent recollection, I believe you said was without the aid of any instrument, refreshers or any [52] form of instrument that would recall the subject to me. Is that right?

Mr. Fonville: You are quoting one of my questions to you?

(Deposition of George Kendig.)

A. Yes, and I, in turn, asked you to please define independent recollection, and that you did.

Q. (By Mr. Churchill): You can remember what your brother said to you?

Mr. Seay: Just a minute. We object to that as leading.

A. Independent recollection? No.

Q. (By Mr. Churchill): You do remember, do you remember just about what your brother said to you?

Mr. Seay: We object to that as going back over the same thing, Mr. Churchill, and a conclusion.

Mr. Churchill: That is enough questions.

Recross-Examination

By Mr. Seay:

Q. I have just another question.

A. This is cross-examination, perhaps?

Q. Yes, it will be cross-examination. You have testified in response to Mr. Fonville's question that you made an affidavit at the request of Patsy O'Rourke Kendig?

A. Yes, yes, that's correct. [53]

Q. Did she make that request in person or talking to you orally or did she write you about it?

A. I am unable to say.

Q. You don't remember the circumstances about it?

A. That's correct.

Q. But you do remember she asked you to make an affidavit?

A. (Witness nods head.)

Q. Speak out. A. Yes.

(Deposition of George Kendig.)

Mr. Fonville: He can't get the nod of your head.

Q. (By Mr. Seay): Mr. Kendig, who actually prepared this affidavit you refer to?

A. I don't recall the man's name, the officer's name.

Q. Was it typewritten when handed to you? Do you remember that?

A. Well, I remember making the statements on the affidavit and they were verbal, to a yeoman.

Q. The point is you didn't write it out in long-hand yourself? A. No, no, I didn't, no.

Q. And you have always, in response to Mr. Fonville's questions, stated you were riding in an automobile and you remember your brother was driving and you remember nothing of the event leading up to this conversation. I will ask you whether or not you recall anything [54] subsequent to the conversation as to where you went or anything pertaining to that activity with your brother?

A. Well, he asked me specifically where I was, where I was going, and I can't remember that. I can remember while visiting him I went to his house and we went to dinner somewhere and came back to his house and we drove on the Atlantic City streets during that time and we drove in his automobile and he drove the automobile.

Q. And that is all you remember about it?

A. Yes.

Q. You only stayed a day on the visit down there with your brother, I believe you said?

A. 24 hours.

(Deposition of George Kendig.)

Q. Are there any other persons you have talked to about—— A. Yes, my wife.

Q. Is that all?

A. The person who took the affidavit, Mr. Churchill, Mr. Fonville, Mr. Seay, and your name, we are discussing it now.

Q. Of course, when you talked to Mr. Fonville and Mr. Seay and Mr. McCreight you never saw us before we walked in this door taking the deposition?

A. No, but we discussed it now.

Q. You have never discussed it with us previously? [55] A. No.

Q. And the only persons you recall discussing the affidavit with before this deposition hearing was your wife and the officer that took the affidavit, and Mr. Churchill?

A. And one other. I don't remember his name. He was a Chaplain on the base.

Q. He was what? A. The Chaplain.

Q. How did you happen to talk to him about it?

A. I don't remember the incidents that preceded.

Q. Were you doing it for advice or something like that about whether you should make such an affidavit? A. No, I didn't.

Q. You don't remember why you happened to talk to him? A. No.

Q. Was it before or after? A. Before.

Q. Before you made the affidavit?

A. Yes.

Mr. Seay: That's all.

Mr. Fonville: That's all.

Mr. Churchill: That's all.

(Signed) GEORGE KENDIG. [56]

Subscribed and sworn to before me by the said witness, George Kendig on this the 29 day of September, A. D. 1947.

[Seal] (Signed) L. W. McCREIGHT.

Notary Public in and for Dallas County, Texas."

The Court: We will suspend until two o'clock. Keep in mind the Court's admonition.

(Thereupon a recess was taken at 12:00 o'clock noon).

2:00 o'Clock P.M.

(All parties, as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

The Court: Call your next witness.

Mr. Cunningham: If the Court please, before we get too far away from a point that occurred to me during the lunch hour, may I be permitted to ask one or two questions of Mrs. Kendig?

The Court: Yes.

Mr. Cunningham: It is something I really overlooked, and I apologize for it, but I would like to ask one or two questions of Mrs. Kendig before I get too far.

Mr. Linton: You mean the plaintiff?

Mr. Cunningham: Yes, the plaintiff. [57]

PATRICIAL O'ROURKE KENDIG

resumed the witness stand and testified further as follows:

Cross-Examination

Mr. Cunningham:

Q. Mrs. Kendig, on your examination and the testimony you gave before the lunch hour, you stated, I believe, that you had a conversation with your husband at a time when he told you that the insurance had been changed, or things had been taken care of? A. Yes.

Q. Words to that effect? A. Yes.

Q. Do you recall where that conversation might have been had?

A. Well, I said before I thought it was in February—wait—January, but on reconsidering, it was around in the middle part of February and at that time it was made in the presence of a friend who also——

Q. Afterwards, however, say, in the month of March, 1945, you wrote to the Department, the Insurance Department at Washington, didn't you, the Bureau of Naval Personnel?

A. I beg your pardon?

Q. Concerning this subject?

A. When was that? [58]

Q. That was about March, say, March—well, say the 20th of March, 1945.

A. I had a great deal of correspondence with the Department, and I believe it was around in that time.

Q. Do you recall writing to the Bureau of Naval

(Testimony of Patricia O'Rourke Kendig.)

Personnel about the same subject on the probability of the insurance having been changed as to the beneficiary named? A. Yes, I do.

Q. And at the time you wrote to the Department, it was after, of course, you had had the conversation with your husband? A. Yes.

Q. So that you recall—first, may I show you an instrument, please, and ask you whether or not this is in your handwriting?

A. Yes, that is in my handwriting.

Q. That is in your handwriting? A. Yes.

Q. And that is dated February——

A. 28th.

Q. 28th, 1944? A. Yes.

Q. But that should have been February 28th, 1945, shouldn't it? A. Yes, it should have.

Q. Now, at that time, when you wrote this letter to the Bureau of Naval Personnel, you didn't at that time advise them that you had had a conversation with your husband to the effect that the beneficiary had been changed, had you?

A. No, I don't believe I advised them of that.

Q. In writing to the Bureau of Naval Personnel on February 28th, 1945, you stated that your information——

Mr. Divelbess: Do you offer that in evidence?

Mr. Cunningham: ——as to any change had come from George Kendig, the brother of your husband, didn't you?

A. Well, I don't remember just what I wrote to them, but the information that George knew about

(Testimony of Patricia O'Rourke Kendig.)

it came to me—didn't come directly from George, but that is what I was informing them in trying to back up my statement that I believe the change had been made.

Mr. Cunningham: Well, let me show you this instrument again and just read it or familiarize yourself with it, please, Mrs. Kendig. It is very short, (handing document to the witness).

(The witness reads the document.)

Mr. Divelbess: Your Honor, I might suggest that the letter be first offered in evidence and he can examine her concerning it.

The Court: All right, better have it marked, Mr. Cunningham. [60]

Mr. Cunningham: Yes, I think that is right.

The Witness: Well——

Mr. Cunningham: Just wait a minute, the Court wants me to ask you another question.

A. All right.

Mr. Cunningham: Since this is a part of the official file we will ask permission that it be photostated and a photostatic copy be substituted if it is agreeable with counsel in the case.

Mr. Linton: All right.

The Court: All right.

Mr. Cunningham: May this be marked then, if the Court please, as a part of Defendant Mary Kendig's cross-examination?

(Thereupon the document was marked as Defendant Kendig's Exhibit A for identification.)

(Testimony of Patricial O'Rourke Kendig.)

Mr. Cunningham: Well, I will offer it in evidence.

Mr. Divelbess: No objection.

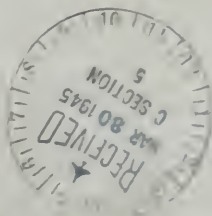
(The document was marked as Defendant Kendig's Exhibit A in evidence.)

Left Kendig A
Kendig vs Kendig, et al
Case No. Civ. 253 Bly
FEDERAL DISTRICT COURT

✓ At CC. 20 1947
Clerk H. L. Linder
U.S. DISTRICT COURT
FEDERAL DISTRICT COURT

BY _____

RECEIVED
ADJUDICATION UNIT
APR 10 1945
TERM INS. DIV. GROUP
LIFE INS. DIV. GROUP
APR 11 1945
RECEIVED
ADJUDICATION UNIT
KRAMER
RECEIVED
ADJUDICATION UNIT
APR 12 1945



Chief of Naval Personnel
Washington, 25, D.C.

717 W. Latham
Phoenix, Arizona
7-8-45
BUREAU OF NAVAL PERSONNEL
NAVY DEPARTMENT
RECEIVED
Lt. (j.g.) G. V. (N), U.S.N.
114-398

Gentlemen:

Re: Kendig, Wiley S.
114-398

Would you please be kind enough to check the file of the above named veteran to determine whether or not there is a change of beneficiary now made out in my behalf? I was told by my husband's brother that he had made me beneficiary to his government insurance policy and I believe this change probably had been sent in to the Veterans Administration at the time of his death. Therefore, I think it quite possible this form might be in your file. I would appreciate an immediate reply.

RECEIVED
MAR 21 1945
114-398

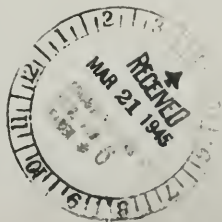
Very truly yours
Wiley Kendig
(Mrs. Wiley Kendig)

P.S. I might add that, at the time of

my husband's death. I was shown his
 personal file by his commanding officer,
 Lt. Comdr. Fore, who stated that all
 papers were in order. I saw the chance
 beneficiaries slip to me, insurance.

If I can be of any further assistance
 to you in finding this information, please
 let me know. The Veterans Administration
 Insurance Division is also working
 this for me.

F.C.



(Testimony of Patricia O'Rourke Kendig.)

Q. (By Mr. Cunningham): Now, I show you Defendants' Exhibit No. A, Mrs. Kendig, and ask you again, at the time of writing—this is a letter from you to the Bureau of Naval Personnel at Washington, D. C., is it not? A. Yes. [61]

Q. And it is dated February 28th, 1944?

A. It should have been '45.

Q. But that should have been—— A. '45.

Q. '45.

A. Because I didn't find out about it until '45.

Q. Now, at that time when you wrote to the Government you didn't have—you didn't recall having had that conversation with your husband, to the effect that the beneficiary in his life insurance policy had been changed to you?

A. Had been changed. Well, I hadn't gotten direct information from George—I mean I—he had not been as definite. I mean, he just kept repeating definitely that Wiley said he had changed it, and at this time I was not sure he had made such a definite statement, but I am positive that my husband told him that he had changed it.

Q. Then—— A. He didn't tell me——

Q. At this time you told the Department that you were told by your husband's brother that he had made you the beneficiary to his Government insurance policy? A. Yes.

Mr. Cunningham: That is all, and may I read the letter as a part of the cross-examination, if the Court [62] please?

The Court: Yes.

(Testimony of Patricia O'Rourke Kendig.)

(Thereupon Defendant's Exhibit A in evidence was read to the jury by Mr. Cunningham.)

Mr. Linton: Are you through, Mr. Cunningham.

Mr. Cunningham: Just excuse me a minute.

Q. Mrs. Kendig, was that the time when you were referring to in this Defendants' Exhibit A as having seen the report, is that when you saw the confidential report that you spoke of this morning?

A. I don't quite understand. Would you repeat that question, please, when I saw—yes.

Q. "P.S." A. Oh, yes, I know now.

Q. You know now?

A. Yes, that was the time I saw the confidential report.

Q. That was the time?

A. That was the only time, until Representative Harless got the form for us and I identified it as being the same one that I had seen at the base.

Q. But that was the time when you saw that file which you testified to as being the confidential report this morning?

A. Yes. May I make a statement, please?

Q. Yes. [63]

A. At the time that I said this possibly was in the Naval Personnel files, I wasn't aware of the fact that George Kendig had said that he had sent it in to the Veterans Administration.

Q. Well, Mrs. Kendig, as you say, at the time you were not aware. You made an affidavit and sent it in to the Department, didn't you, when you

(Testimony of Patricial O'Rourke Kendig.)

claimed this insurance, or made a claim for it, didn't you make an affidavit and send it in?

A. I don't recall. I sent in my application for it.

Q. Well, that is—all right, you made an application for this insurance? A. Yes.

Q. And set forth such facts as you had for the purpose of supporting your claim? A. Yes.

Q. And at that time you didn't make in that affidavit or that claim any statement that you had had such a conversation with your husband, did you?

A. I thought I did because I have other testimony here.

Q. Do you have a copy of that—is it conceded that she didn't make that statement?

A. I don't believe I made an affidavit.

Mr. Cunningham: Will you let me have a copy of it, or will you concede that she made that statement? Is [64] this a copy of it? All I want to do is let her look at it.

Mr. Linton: It is perfectly all right (handing document to attorney).

Mr. Cunningham: Counsel have furnished me with a carbon copy of an affidavit that they say I might use merely for the purpose of getting an answer to this question.

Q. Do you recall you made an affidavit, of which this seems to be a copy, Mrs. Kendig?

A. Yes, I made this affidavit.

Q. Do you recall when it was made?

A. Well, it was made after I started receiving counsel.

(Testimony of Patricia O'Rourke Kendig.)

Q. Some time in October, 1945, would it be?

A. Yes.

Q. At least, it was in the month of October, 1945? A. Yes.

Q. And after examination of that would you now say you made any showing or statement that you had had the conversation with your husband that the beneficiary in the insurance had been changed? A. Yes, it was at this time.

Q. But you made no such statement at that time in your affidavit, did you; you made no such statement that you had had a conversation with your husband, [65] Wiley Kendig?

A. Let me read that just a moment, please (looking over document). He stated to me, as his wife—that is my affidavit—that he made the beneficiary to me as his wife, and my friend was there at the time, Mrs. Tommie Ruth Faulkner. That is my affidavit that he made that, telling—where he said—I mean we had this conversation in the presence of a witness.

Mr. Cunningham: All right, that is all, if the Court please.

Redirect Examination

By Mr. Linton:

Q. Mrs. Kendig, in other words, what you were referring to there when you were talking to Mr. Cunningham is this second paragraph?

A. Yes.

Q. Where you state: "That the said J.G. Grade Wiley Sorrell Kendig, during his lifetime and in

(Testimony of Patricia O'Rourke Kendig.)

the presence of Tommie Ruth Faulkner, stated that he had changed the beneficiary in his National Life Insurance Policy to me as his wife?"

A. Yes, that is right.

Q. That is the statement you are referring to?

A. Yes.

Q. In other words, you had told them then that you [66] had had a conversation with your husband before his death?

A. I did in that affidavit.

Q. Now, I show you here a photostatic copy of an affidavit and ask you if you can identify that signature, if you know anything about that affidavit?

A. Yes, I have seen the affidavit.

Q. And do you know approximately when the affidavit was made?

A. In September, 1945.

Q. In September, 1945, and whose affidavit is that?

A. This is George Kendig's affidavit.

Q. Then that was after your letter of February, 1945, to the Naval Personnel?

A. Yes.

Q. And was that affidavit made at your request, or how did you happen to come into possession of the original of that photostatic copy?

A. I wrote a letter to my brother-in-law and asked him if he could make an affidavit on what he was claiming was my husband's statement on that.

Q. And do you know where the original of that affidavit is, the photostatic copy of which you have in your hand?

A. It is in the file, isn't it?

Q. In what file? You mean the Government file?

A. Government file.

(Testimony of Patricia O'Rourke Kendig.)

Q. In other words, you don't have it in your possession? A. I have not.

Q. That, I believe, was sent in to the Government along with your claim for benefit?

A. Yes.

Mr. Linton: May this be marked for identification?

(The document was marked as Plaintiff's Exhibit 2 for identification.)

Mr. Linton: We offer this in evidence, your Honor, to show that the affidavit was not——

Mr. McAlister: May we see it?

Mr. Linton: Certainly. I think you have the original there.

Mr. Cunningham: We object on the ground it is purely hearsay and it is covered by some things in that deposition read this morning, being an affidavit made by George Kendig while he was in the hospital in San Francisco, if I recall, and refers only to a conclusion of the witness according to the statement contained——

Mr. Linton: Your Honor, my purpose in offering this affidavit is to show that the plaintiff, at the time of writing the letter of February, 1945, did not at that time have definite knowledge, and it was not until September, 1945, that she knew of the statements [68] of her brother-in-law regarding the change of beneficiary.

The Court: All right, it may be received.

(The document was received as Plaintiff's Exhibit 2 in evidence.)

(Testimony of Patricia O'Rourke Kendig.)

PLAINTIFF'S EXHIBIT No. 2

AFFIDAVIT

State of California,
County of San Francisco—ss.

George Kendig, being duly sworn, deposes and says:

That I am a Lieutenant (j.g.), U.S. Naval Reserve, presently stationed at the U.S. Naval Hospital, Treasure Island, San Francisco.

That I am submitting this affidavit in support of a claim for insurance filed by my sister-in-law, Patricia O'Rourke Kendig, widow of my late brother, Lieutenant (j.g.) Wiley SoRelle Kendig.

That on or about March 18, 1944, at Atlantic City, New Jersey, I had a conversation with my brother, who was stationed at said city as a United States Naval Pilot, in which he stated that he had sent in a form to the United States Veterans' Bureau requesting said bureau to change the beneficiary on his ten-thousand (10,000.) dollar National Service Life Insurance Policy from my mother, Mary SoRelle Kendig, to his wife, Patricia O'Rourke Kendig.

That on March 24, 1944, my brother was killed in a plane accident and since that time my mother has been receiving payments under the above named insurance policy.

That on or about September 1, 1945, payments on said policy were stopped because of a conflict between my mother and my sister-in-law.

(Testimony of Patricia O'Rourke Kendig.)

That I am submitting this affidavit only to carry out the wishes expressed to me by my late brother.

/s/ GEORGE KENDIG.

[Seal]

State of California,

County of San Francisco—ss.

On this 28th day of September, 1945, before me, James C. Healey, the undersigned officer, personally appeared George Kendig, known to me (or satisfactorily proven) to be serving in or with the armed forces of the United States and to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same. And the undersigned does further state that he is at the date of this certificate a commissioned officer of the rank stated below and is in the active service of the armed forces of the United States.

/s/ JAMES C. HEALEY,

Lieut., D(L), USNR, 328770,

Legal Assistance Officer.

[Endorsed]: Filed Oct. 28, 1947.

Mr. Linton: I'd like to read this to the jury as a part of the plaintiff's examination.

(Thereupon Plaintiff's Exhibit 2 in evidence was read to the jury.)

Mr. Linton: At this time, your Honor, I'd like to make a demand on the defendant, the United States Government, to produce a photostatic copy

(Testimony of Patricia O'Rourke Kendig.)

of the confidential report which has been testified to that was in the files of the Commanding Officer Vorse, which the plaintiff testified she talked to a day or so after the death of her husband. I believe that is on file. We have no copies of it, but the United States Attorney has a photostat of it and I would like to make demand for the production of that copy to use and mark it in evidence.

Mr. Cunningham: May it please the Court, we have no photostatic copy of a document that purports to be the confidential report that was—that is in my file. It is not a part of the usual record in Veterans' cases, I am informed by Mr. Gross that veterans' information, any information they obtain from another [69] division, particularly the Army and Navy, and it cannot be revealed by them.

The Court: Well, Mr. Harless sent this witness a copy of it, why couldn't it be revealed?

Mr. Cunningham: Probably the Army itself could be made to furnish a copy.

The Court: Oh, well, you can read that into the record.

Mr. Cunningham: This is not the original and we have no way of knowing that it is, although there might be some way of identifying it, and Mr. Gross would like to know if it is an order directing him to produce it, as it is in his custody actually temporarily.

The Court: Yes, you can read it into the record and give it back to Mr. Gross.

Mr. Linton: We will have this marked. Your

(Testimony of Patricia O'Rourke Kendig.)

Honor, if counsel wishes this in his file, we will read the information in so he can have it back in his file, is that the idea?

The Court: Yes, that is the idea. If it is not supposed to be divulged, you had better leave those records at home and not bring them into Court.

Mr. Linton: I would like to have it marked for identification. That won't hurt this file?

The Court: No, that won't hurt it.

Mr. Cunningham: Personally, you can put it in the [70] file and withdraw it later.

(The document was marked as Plaintiff's Exhibit 3 for identification.)

Q. (By Mr. Linton): I will show you Plaintiff's 3 for identification and ask you if you can recognize the signature thereon?

A. Yes, it is the signature of my husband.

Q. And I will ask you if you have ever seen the original of that document, if there is anything about that that will identify to you the original document of which this is purported to be a photostatic copy at this time?

A. Yes, this is——

Q. Talk louder so the jury can hear you.

A. This is the photostatic copy of the original that was in the Bureau of Naval Personnel file, and it is also the one that was in the—this file was the one that was with Commander Vorse, my husband's commanding officer in Atlantic City, when I looked at it. It was just a paper he showed me when I asked him if the Government insurance

(Testimony of Patricial O'Rourke Kendig.)

was complete, the records were complete, and this is the one he showed me.

Q. Is that instrument dated—do you see any date on that that would indicate when it was filled out? A. February 5th, 1944.

Q. That is dated at the upper right hand corner of [71] the first sheet?

A. Yes, July, '44 or '45.

Q. '44, that was right, wasn't it?

A. Yes, '44.

Q. I will ask you to read the remaining part of Sheet 1, beginning with the words, "I hold the following insurance policies: Answer: The name of Company: Government; amount, \$10,000; Beneficiary, Wife; Location of Policy: Phoenix, Arizona, with Mrs. Mary Kendig."

Mr. Linton: No further questions.

(The witness was excused.)

Mr. Linton: Mr. Palmer.

RALPH E. PALMER

was called as a witness on behalf of the plaintiff, and, being first duly sworn, testified as follows:

Direct Examination

By Mr. Linton:

Q. Will you state your name to the jury, please?

A. Ralph E. Palmer.

Q. What is your residence?

(Testimony of Ralph E. Palmer.)

A. 95 West Cypress, Phoenix.

Q. How long have you lived in Phoenix?

A. Off and on since 1925.

Q. Have you at any time been employed by the Veterans Administration in the Insurance Division?

A. I have.

Q. And when and where was that employment?

A. I was sworn in in Washington the 19th of March, 1946, and left the employment about the 1st of May this year.

Q. May, 1947? A. Right.

Q. Now, while you were associated—what was the full name of the department you were in, I may be misquoting names?

A. I was Insurance Officer for this local office.

Q. Of the Veterans Administration?

A. Right.

Q. And as Insurance Officer, do you know anything about the National Service Life Insurance Policies? A. Yes, sir.

Q. I believe you have been in the insurance business before you went into the Service?

A. Since 1920.

Q. How long were you in Washington, D. C., when you first went with the Insurance Division?

A. Four weeks.

Q. And were you working there—did you have an official capacity there, or what was your purpose in [73] being in Washington at that time?

A. We went back there for school instruction, which lasted about two weeks, and then the remain-

(Testimony of Ralph E. Palmer.)

ing two weeks we were around the various departments acquainting ourselves with the routine.

Q. During your time there in Washington, did you have any occasion to observe the condition of the files and the records of the various policyholders of this National Service Life Insurance?

Mr. McAlister: Just a minute. I object to that as it has no particular bearing on the case here, no showing that any change of beneficiary had ever reached Washington as the rest of them did. I don't see that there is any materiality to the testimony of Mr. Palmer here at all.

Mr. Linton: Your Honor, it is our contention that the evidence shows that such change was sent in, and our intention, honestly, in producing this witness, is to show that some state of confusion existed in Washington.

The Court: It always exists in Washington.

Mr. Linton: To check some eighteen million policyholders overnight.

The Court: I do not think it is proper.

Mr. Linton: No further questions.

Mr. McAlister: You do not think it is proper?

The Court: Yes.

Mr. Linton: The plaintiff rests, if your Honor please.

(The witness was excused).

The Court: Well, I will have to hear some arguments of counsel. I think I will excuse you until ten in the morning, and we may dispose of this case in that time without your intervention, so keep in

mind the admonition I gave you and be in court at ten.

(Thereupon the jury was excused).

Mr. Cunningham: Your Honor please, may I proceed to make a motion?

The Court: Yes.

Mr. Cunningham: We believe it to be relevant at this time. I have a memorandum brief which I would like to give to the Court and to counsel at the time I am making my argument, and it will probably allow me to be a little bit more brief in my argument.

If the Court please, in this matter I have rather concluded that as to the motion to strike portions in that deposition because it, in and of itself, defeats itself, and for the further reason that testimony put on in the case might better be considered from the standpoint of two objections: one, that it is purely and wholly hearsay, and second, that it could not be other than a conclusion of George—the deponent, and [75] even a conclusion, if stated in that manner by Wiley, the deceased, the assured.

In this case we have a few words, a very few words, and amplified, it is true, throughout that deposition, upon an assumption, or because of other things that are identified in the manner of testimony—irritator, prompting other things, many of which was, in its final analysis: “I am making this deposition on an affidavit and because of the affidavit and as a result of the affidavit,” but as to this objection on hearsay and as to the objection of it being a conclusion, I think we have fully set out in

this brief that the hearsay character of this testimony makes it wholly inadmissible, for the reason that in the event the words "I sent," or "He said he had sent in a form," that is far short of being evidence to the effect that he had made the change of beneficiary. All of the conclusions, all of the results, flow from that, even given the word "form" a presupposition that that was sent. Of course, the requirements under the Act are, first, that it shall be in writing and shall be signed and shall be directed or sent to the War Veterans Bureau, and that it shall contain information sufficient to identify the person asking that the change be made, but there is no evidence in here any place that would support that, and of course, there can be no judicial determination on that [76] unless there is some evidence on which the Court can base its judgment, so in this case the entire testimony as given is purely hearsay; so in this case the entire testimony as given is purely hearsay. Then, if, as I say, there was or could have been added to the words "had sent in a form," and in some place in the deposition it appeared "for the purpose of changing the beneficiary from the mother to the wife," if that could possibly be read into that testimony, then that part, of course, would be a conclusion on the part of the assured himself.

Now, as I say, we have rather set this out fully and we have cited the authorities. A leading case is exactly like this, on all fours, which is *Kingston versus Hines*, and it is cited in there, if the Court please. The other case is one on all fours, that is

the case of Bradley versus United States, in which the lower court felt that this evidence, similiar to this, where this same confidential report was admitted to be in dispute would support the intention, and the Court found in the trial that there was something there to permit the change being made, and upon going to the Circuit Court it was analyzed in detail and they had to reverse that and send it back.

Now, I am willing to submit this on the analysis of these facts as have been shown in this brief without [77] taking a great deal of time of the Court. If, however, we see fit to make any answer to counsel's argument, why, I should like the permission to do that.

The Court: Very well.

(Thereupon further argument between counsel).

Mr. McAlister: I would like to join in the motion made by Mr. Cunningham on the matter of hearsay evidence, and I would also like to further move on the part of the Government that the case be dismissed on the ground that even admitting the hearsay evidence, there has not been sufficient evidence introduced to state a cause of action in the complaint for the relief sought.

(Further argument between counsel).

The Court: All right, I will read your cases and rule on it in the morning.

(Thereupon a recess was taken at 3:15 o'clock, p.m.) [78]

10:00 o'clock, A.M., October 29, 1947.

All parties, as heretofore noted by the Clerk's record being present, including the jury, the trial proceeded as follows:

Mr. Cunningham: If the Court please, for the purpose of the record, may I be permitted to enlarge the motion I made yesterday that the action be dismissed so as to include that the jury be instructed——

The Court: Directed to return a verdict?

Mr. Cunningham: Yes.

The Court: All right. I think the motion should be granted. I don't think the plaintiff has made out a case, so if you will prepare the verdict, I will appoint Mr. Goldwater foreman and ask him to sign it.

(Thereupon the verdict was signed by the juror).

The Court: All right, you may record the verdict.

(Thereupon the trial was ended). [79]

I hereby certify that the proceedings had upon the trial of the foregoing cause are contained fully and accurately in the shorthand record made by me thereof, and that the foregoing 79 typewritten pages constitute a full, true and accurate transcript of said shorthand record.

/s/ LOUIS L. BILLAR,

Official Reporter.

[Endorsed]: Filed March 30, 1948.

[Endorsed]: No. 11927. United States Circuit Court of Appeals for the Ninth Circuit. Patsy O'Rourke Kendig, Appellant, vs. Mary Boone Kendig, and United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed May 10, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11927

PATSY O'ROURKE KENDIG,

Appellant,

vs.

MARY BOONE KENDIG and

UNITED STATES OF AMERICA,

Appellees.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY AND DES-
IGNATION OF RECORD FOR PRINTING

Patsy O'Rourke Kendig, the appellant in the above-entitled action, pursuant to Subdivision 6 of Rule 19 of the Rules of the above-named Court, hereby presents the following statement of the points on which she intends to rely on this appeal:

1. That the Trial Court erred in refusing to admit the testimony of Ralph E. Palmer regarding the condition of the files and records of the various policyholders of National Service Life Insurance, for the reason that this testimony would have shown that some state of confusion existed in the handling of Government insurance policies and correspondence and that on occasions forms and correspondence pertaining thereto were lost or misfiled.

2. That the Trial Court erred in granting defendant's motion to direct jury to return a verdict for the defendants, for the reason that the evidence offered by the appellant by means of testimony, deposition and exhibits, was sufficient to require submitting the case to the jury on the question of whether or not Wiley SoRelle Kendig had sent in to the Veterans' Administration a change of beneficiary from his mother, Mary Boone Kendig, to his wife, Patsy O'Rourke Kendig. [82]

This appellant hereby designates to be printed the whole of the record, including exhibits and Reporter's Transcript, forwarded to this Court by the Clerk of the United States District Court, except the following portions of said record:

Setting case for trial, at page 14 of Transcript of Record

Resetting case for trial, at page 15 of Transcript of Record

Resetting case for trial, at page 16 of Transcript of Record

Verdict, at page 20 of Transcript of Record
Judgment, at page 22 of Transcript of Record

Dated this 7th day of May, 1948.

GUST, ROSENFELD,
DIVELBESS, ROBINETTE
& LINTON.

By /s/ JAMES C. ENGDAHL,
Attorneys for Appellant.

Received copy of the foregoing this 8th day of
May, 1948.

FRANK E. FLYNN,
By /s/ CHAS. B. McALISTER.

Received copy of the foregoing this 8th day of
May, 1948.

CUNNINGHAM, CARSON,
MESSINGER & CARSON,
By /s/ D. EGGERT.

[Endorsed]: Filed May 10, 1948.

No. 11927

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

PATSY O'ROURKE KENDIG,

Appellant,

vs.

MARY BOONE KENDIG, and
UNITED STATES OF AMERICA,

Appellees.

Appeal from the United States District Court
for the District of Arizona

Brief of Appellant

GUST, ROSENFELD, DIVELBESS,
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FILED

JUL 29 1948

J. P. O'BRIEN,

CLERK

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IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

PATSY O'ROURKE KENDIG, a widow, <i>Appellant,</i>	}	No. 11927
vs. MARY BOONE KENDIG, a widow, and UNITED STATES OF AMERICA, <i>Appellees.</i>		

Brief of Appellant

In this brief, the parties will be referred to by their designations in the District Court, viz: Appellant as plaintiff and appellees as defendants.

References to the printed Transcript of Record will be indicated by the letter "T" followed by numerals denoting the page number.

This is an appeal from a judgment of the United States District Court, for the District of Arizona, giving judgment for defendants on directed verdict, where plaintiff was seeking to be declared the beneficiary of the National Service Life Insurance policy of her deceased husband.

JURISDICTION

Plaintiff filed with the Director of Insurance, Veterans Administration, her claim to recover as beneficiary under a National Service Life Insurance policy issued on the life of her deceased husband, Wiley Sorrelle Kendig, pursuant to the provisions of the National Service Life Insurance Act of 1940, c. 757, Title VI, Part I, 54 Stat. 1014; 38 U.S.C.A. Ch. 13. (T-6).

Plaintiff's claim was denied thus causing a disagreement between plaintiff and the United States, and within sixty (60) days from the date of disallowance of her claim, plaintiff brought suit in the District Court of the United States for the District of Arizona, invoking the jurisdiction of said Court, pursuant to the provisions of c. 757, Title VI, Part I, par. 617, 54 Stat. 1014 as amended; 38 U.S.C.A. Sec. 817; and c. 320, par. 19, 43 Stat. 612 as amended; 38 U.S.C.A. Sec. 445. (T-7)

Trial of this matter was had, and on November 7, 1947, judgment for defendants on directed verdict was entered. (T-4, T-19, T-20)

On November 15, 1947 plaintiff filed Motion for a New Trial (T-4, T-22) which motion was denied on January 13, 1948. (T-5, T-23)

The judgment thereby became a final judgment and appeal therefrom to the Circuit Court of Appeals lies under c. 517, par. 6, 26 Stat. 828, as amended; 28 U.S.C.A. Sec. 225, the general statute on appeal, and within the time limit allowed by c. 517, par. 11, 26 Stat. 829, as amended; 28 U.S.C.A. Sec. 230. Notice of appeal was seasonably given and appeal bond filed. (T-23, T-24)

STATEMENT OF THE CASE

Wiley SoRelle Kendig enlisted in the United States Navy as an aviation cadet and shortly thereafter he was granted Ten Thousand (\$10,000.00) Dollars National Service Life Insurance under policy N-5,004,911, effective August 21, 1941. (T-7, T-14)

Wiley SoRelle Kendig was unmarried at this time and his mother, the defendant Mary Boone Kendig, was designated as the beneficiary .(T-7, T-14)

Wiley SoRelle Kendig received his commission as a Navy officer and after some flying duty in the Caribbean area (T-36) he returned on leave to his home in Phoenix, Arizona and on November 29, 1943 he married Patsy O'Rourke, the plaintiff, whom he had known for some time before the war and who had been his sweetheart while both were attending college at Tempe, Arizona. (T-35, T-37)

After their marriage, Wiley SoRelle Kendig and Patsy O'Rourke Kendig went together to his station at Norfolk, Virginia and afterwards to his new station at Atlantic City, New Jersey. (T-37)

Less than four months after their marriage, Wiley SoRelle Kendig was killed in an airplane crash near Tucahoe, New Jersey, on March 23, 1944. (T-42) Subsequent to the death of Wiley SoRelle Kendig, a son was born as issue of the marriage of Wiley SoRelle Kendig and Patsy O'Rourke Kendig. (T-8, T-11)

Shortly before his death, Wiley SoRelle Kendig had told Patsy O'Rourke Kendig that he had changed the beneficiary of his life insurance (T-40) and two days after his death she saw a confidential report dated February 5, 1944 and signed by Wiley SoRelle Kendig

which was shown to her by his squadron commander, in which she was name as beneficiary of his government insurance. (T-43, T-97)

On April 5, 1944, the defendant, Mary Boone Kendig filed her claim with the Veterans Administration for the benefits of the National Service Life Insurance of Wiley SoRelle Kendig. On March 17, 1945 she was awarded the benefits thereof, effective March 23, 1944 and this award was suspended September 13, 1945. (T-14)

On July 18, 1944 the plaintiff, Patsy O'Rourke Kendig, filed her claim as widow of Wiley SoRelle Kendig for the benefits of his policy of insurance. She was notified by the Veterans Administration on March 27, 1946 that her claim was denied. (T-14)

Plaintiff, Patsy O'Rourke Kendig, filed with the United States District Court her complaint seeking to be declared beneficiary of the insurance policy of her deceased husband, Wiley SoRelle Kendig, on May 15, 1946. (T-9)

Mary Boone Kendig and the United States of America each filed an answer (T-10, T-13) and the cause came up for trial on October 28, 1947 . (T-16)

At said trial, plaintiff introduced evidence to show that Wiley SoRelle Kendig had made her the beneficiary of his National Service Life Insurance. Plaintiff testified that Wiley SoRelle Kendig, shortly prior to his death, told her that he had made the change of beneficiary. (T-40, T-79, T-90, T-91) Plaintiff also testified that about two days after the death of her husband, Wiley SoRelle Kendig, she was discussing mat-

ters with Commander Vorse, her husband's commanding officer, and in answer to her question as to whether the government insurance was complete, Commander Vorse showed her a confidential report for the government files, dated February 5, 1944, signed by Wiley SoRelle Kendig, in which he said he had \$10,000 of government insurance, beneficiary was his wife, and policy was located at Phoenix, Arizona, with his mother. (T-43, T-96, T-97) Plaintiff then offered the deposition of George Kendig, the brother of Wiley SoRelle Kendig, and George Kendig testified that only a few days before his death, Wiley SoRelle Kendig said that he had sent in a form to change the beneficiary on his government insurance from his mother, Mary Boone Kendig, to his wife, Patsy O'Rourke Kendig. (T-50, T-56, T-58, T-59, T-69) Plaintiff further offered as evidence the testimony of one Ralph E. Palmer concerning the state of the files of the Veterans Administration in Washington, but this testimony was excluded by the court. (T-99)

Plaintiff then rested her case and thereafter on motion of the defendant, Mary Boone Kendig, the court directed the jury to return a verdict for the defendants on the ground the plaintiff had not made out a case to show that Wiley SoRelle Kendig had changed his beneficiary from his mother to his wife. (T-19, T-20, T-103)

Thereupon, plaintiff filed a motion for a new trial, (T-22) which motion was denied January 13, 1948 (T-23) and plaintiff has now appealed to this court Order denying plaintiff's motion for a new trial. (T-23) from the Judgment on Directed Verdict and from the

SPECIFICATIONS OF ERRORS

I

The District Court erred in refusing to admit the testimony of Ralph E. Palmer. The grounds urged at the trial for the objection to the evidence was as follows:

“Q. During your time there in Washington, did you have any occasion to observe the condition of the files and the records of the various policyholders of this National Service Life Insurance?”

Mr. McAlister: Just a minute. I object to that as it has no particular bearing on the case here, no showing that any change of beneficiary had ever reached Washington as the rest of them did. I don't see that there is any materiality to the testimony of Mr. Palmer here at all.

Mr. Linton: Your Honor, it is our contention that the evidence shows that such change was sent in, and our intention, honestly, in producing this witness, is to show that some state of confusion existed in Washington.

The Court: It always exists in Washington.

Mr. Linton: To check some eighteen million policyholders overnight.

The Court: I do not think it is proper.” (T-99)

The substance of the evidence which was not admitted was that Ralph E. Palmer would have testified to the state of confusion that existed in the Veterans Administration in the handling of government insurance policies and correspondence because of the tremendous volume of work being handled, and that on some occasions forms and correspondence pertaining to such insurance were lost or misfiled.

II

The District Court erred in granting defendant's motion to direct the jury to return a verdict for the defendants, set forth in the record as follows:

"Mr. Cunningham: If the Court please, for the purpose of the record, may I be permitted to enlarge the motion I made yesterday that the action be dismissed so as to include that the jury be instructed—

The Court: Directed to return a verdict?

Mr. Cunningham: Yes.

The Court: All right. I think the motion should be granted. I don't think the plaintiff has made out a case, so if you will prepare the verdict, I will appoint Mr. Goldwater foreman and ask him to sign it." (T-103)

for the reason that there was sufficient evidence offered by plaintiff to require submitting the case to the jury on the question of whether or not Wiley SoRelle Kendig had changed the beneficiary of his National Service Life Insurance from his mother, Mary Boone Kendig, to his wife, Patsy O'Rourke Kendig.

ARGUMENT

I

Considering first Specification of Error number I, directed to the refusal of the District Court to admit testimony of Ralph E. Palmer (T-99) concerning certain confusion in the Veterans Administration in the handling of forms and correspondence, it is plaintiff's contention that this testimony should have been admitted. Plaintiff had introduced evidence to the effect that Wiley SoRelle Kendig had sent in a form to

change his beneficiary from his mother to his wife. (T-58, T-69) Since the Veterans Administration denies having in its files a change of beneficiary from Wiley SoRelle Kendig, this testimony was offered to explain why it might not be in said files by showing that there was confusion in the Veterans Administration because of the great amount of work being handled, and that on occasions forms and correspondence relating to insurance were lost or misfiled by the Veterans Administration.

In the case of

Gann v. Meek
Fifth Circuit
165 Fed. (2d) 857

where there was evidence by a letter from the deceased marine that he had changed his insurance, the court admitted testimony by a marine who had served in the same general area, but not in the same company or division, at about the time decedent was killed, to the effect that mails were irregular and frequently lost. The court went on to say at 165 Fed. (2d) 858:

“Moreover, it was a well known fact that, during this period, mail piled up in the offices of the Veterans Administration at Washington until months elapsed before requested changes of beneficiaries were made, and during the interim period many letters were either misplaced or lost.”

In the case of

Rutledge v. United States
D.C.W.D. Louisiana
72 Fed. Sup. 352, 357

the court said, in referring to conditions prevalent in processing men for overseas duty:

“It is easy to understand the confusion and probability of mistakes, omissions, and misplacing of

documents and records in such circumstances.”

In the case of

Roberts v. United States
Fourth Circuit
157 Fed. (2d) 906, 909
Cert. denied
330 U. S. 829
67 Sup. Ct. 870

the Court said:

“* * * failure of the change of beneficiary to reach its destination is easily understood when one considers the volume of business transacted at military posts and the character of the administrative organization thrown together to meet the emergency of war.”

It may be that even without the offering of evidence as to the condition of the records of the Veterans Administration, the Court could take judicial notice of the conditions prevalent therein at the time, as the court in *Gann v. Meek*, *supra*, *Rutledge v. United States*, *supra*, and *Roberts v. United States*, *supra*, seemed to do, and as the District Court in the present case indicated in saying “It (confusion) always exists in Washington.” (T-99)

II

We next consider Specification of Error number II, directed to the granting by the District Court of defendant’s motion for a directed verdict.

It is plaintiff’s earnest contention that sufficient evidence was offered at least to require submission to the jury the question of whether or not Wiley SoRelle Kendig changed the beneficiary of his Government Insurance from his mother to his wife, and plaintiff further contends that probably the evidence was suf-

ficient to require a finding that he had thus changed the beneficiary.

The pertinent portion of the statute involving changes of beneficiaries of National Service Life Insurance reads as follows:

“* * * The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, * * * and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries * * *.”

c. 757, Title VI, Part I, par. 602
54 Stat. 1009, as amended;
38 U.S.C.A. Sec. 802 (g)

The pertinent portions of the applicable regulation of the Veterans Administration reads as follows:

“* * * A change of beneficiary to be effective must be made by notice in writing signed by the insured and forwarded to the Veterans Administration by the insured or his agent, and containing sufficient information to identify the insured. Whenever practicable such notices shall be given on blanks prescribed by the Veterans Administration. Upon receipt by the Veterans Administration, a valid designation or change of beneficiary shall be deemed to be effective as of the date of execution * * *.”

Regs. Oct. 16, 1942
7 Fed. Reg. 8363
Par. 10.3447

The cases arising under this statute and regulation have in their language and holdings been clear that there would not be strict adherence to the manner of changing a beneficiary as set forth in the regulation.

As the court said in the case of

Rutledge v. United States
D.C.W.D. Louisiana
72 Fed. Sup. 352, 357

“It is the duty of the courts to give effect to the wishes and intentions of the men in the service, if it is reasonably possible to ascertain them from the available evidence, which they leave behind when giving their lives in defense of their country. It is not required that the rigid forms of ordinary life insurance be followed but sufficient if the intention is made certain and affirmative action taken to express it.”

In the case of

Collins v. United States
Tenth Circuit
161 Fed. (2d) 64, 69
Cert. denied
331 U. S. 859
67 Sup. Ct. 1756

the Court said:

“As pointed out, attempts by an insured to change the beneficiary will be liberally construed if the intent to effect the change is clear and reasonable steps are taken by the insured to bring about such a change. In such a case, technicalities will not be permitted to thwart the express desire of the insured, and a court of equity will treat as done that which ought to be done. * * * In view of all this, it is unreasonable to conclude that the government intended to encircle the right to change the beneficiary with technicalities and make such a change difficult of accomplishment. It is more reasonable to assume that all the government intended to require was satisfactory evidence showing positive action on his part to effectuate such intent, and that when once this is shown, legal

technicalities relating to ministerial acts or perfunctory acts will be brushed aside in order to carry out the expressed will and intent of the insured soldier."

The case of

Johnson v. White
Eighth Circuit
39 Fed. (2d) 793

was decided under the statutes pertaining to changes of beneficiaries of government insurance during the first World War and subsequent thereto. However, the statutes were almost identical to those in effect in 1944, which pertain to the present case. The court in the Johnson case, at 39 Fed. (2d) 796, said:

"The intention, desire, and purpose of this soldier should, if it can reasonably be done be given effect by the courts, and substance, rather than form, should be the basis of the decisions of courts of equity. The clearly expressed intention and purpose of the deceased to have his wife named as the beneficiary in this insurance should control, and should not be thwarted by the fact that all the formalities for making this purpose effective may not have been complied with."

And at 39 Fed. (2d) 797, the Court said:

"Great latitude should be allowed in order to gives effect to the acts and intentions of those in military service in time of war. This has become a public policy of practically every state of the union where statutes will be found making specific provision for nuncupative wills by soldiers or sailors in time of war, and the tendency of the courts is, and should be, to treat the soldiers in such matters with peculiar indulgence."

There are numerous other cases expressing the same view that all that is necessary to change beneficiaries

is for the soldier to express clearly his intent that there be a change and to take some affirmative action to effectuate this intent.

Roberts v. United States

Fourth Circuit

157 Fed. (2d) 906

Cert. denied 330 U.S. 829

67 Sup. Ct. 870

Bradley v. United States

Tenth Circuit

143 Fed. (2d) 573

Cert. denied 323 U.S. 793

65 Sup. Ct. 429

Claffy v. Forbes

280 Fed. 233

Egleston v. United States

71 Fed. Sup. 114

Woods v. United States

69 Fed. Sup. 760

Citron v. United States

69 Fed. Sup. 830

Mitchell v. United States

Fifth Circuit

165 Fed. (2d) 758

McKewen v. McKewen

Fifth Circuit

165 Fed. (2d) 761

Gann v. Meek

Fifth Circuit

165 Fed. (2d) 857

According to Mitchell v. United States, *supra*, the cases are unanimous that where government insurance is concerned and a change of beneficiary is involved, the courts will, in order to carry out the intent of the insured, sweep aside all legal technicalities.

Since there seems to be unanimity among the cases as to the law involved, the place where the courts differ, after intent to change has been shown, is as to the degree of affirmative action needed to carry out the intent and to effect a change.

It is our purpose to go into the fairly recent cases on this point to ascertain what these cases considered necessary as to intent for a change and the affirmative action needed to effectuate this intent, and compare these cases with the present case now on appeal.

In the present case, the following evidence was presented:

The plaintiff testified that her husband, Wiley SoRelle Kendig, told her when they were nearly ready to be transferred that he had to get his papers "all cleared up" before he went out. (T-38) Later in January 1944 he had a crash and about a week later he made the statement again and said that it could happen to him. (T-38, T-39) Then about the middle of February, 1944, in the presence of a witness (T-79), Wiley SoRelle Kendig told his wife that he had changed the beneficiary of his government insurance and everything was settled. (T-40)

On March 25, 1944, two days after her husband was killed, plaintiff was discussing his affairs with his Commanding Officer, Commander Vorse. She asked what condition his life insurance was in. Commander Vorse showed to her a confidential report from the squadron files, signed by Wiley SoRelle Kendig, dated February 5, 1944, in which Wiley SoRelle Kendig stated that he had government insurance in the sum of \$10,000, that the beneficiary was his wife, and that the

policy was located at Phoenix, Arizona with Mrs. Mary Kendig. (T-42, T-44, T-96, T-97)

Plaintiff also offered in evidence the deposition of George Kendig, brother of Wiley SoRelle Kendig, and son of defendant, Mary Boone Kendig. George Kendig testified that in 1944, shortly before his brother's death, he had spent a day with his brother in Atlantic City. (T-49) During the course of their conversation, Wiley SoRelle Kendig told George Kendig that he had sent in a form to change the beneficiary on his government insurance from his mother, Mary Boone Kendig to his wife, Patsy O'Rourke Kendig. (T-50, T-56, T-58, T-59, T-69)

Plaintiff also introduced as Plaintiff's Exhibit 2 in Evidence the affidavit of George Kendig, dated September 25, 1945, in which George Kendig on oath stated that Wiley SoRelle Kendig on March 18, 1944, said that he had sent in a form to the Veterans Administration asking that the beneficiary on his government insurance policy be changed from their mother, Mary Boone Kendig, to his wife, Patricia O'Rourke Kendig. (T-93, T-94)

Although no request for change of beneficiary sent in by Wiley SoRelle Kendig was found in the files of the Veterans Administration, plaintiff contends that there was sufficient evidence of a change of beneficiary so that the jury should not have been directed to return a verdict for defendants.

The jury could reasonably have found from the evidence that Wiley SoRelle Kendig sent a form to the Veterans Administration requesting that the beneficiary of his government insurance be changed from his

mother to his wife, but that somewhere this request was misplaced or lost.

The testimony of the plaintiff that Wiley SoRelle Kendig told her he had changed the beneficiary is amply corroborated by the testimony of George Kendig, brother of the decedent. George Kendig is not interested in the outcome of this lawsuit. (T-72) In effect, when he testified as to what Wiley SoRelle Kendig had said, he was testifying against the interest of his own mother, the defendant, Mary Boone Kendig. Yet in order to help effectuate the expressed desire of his brother, Wiley SoRelle Kendig, to change beneficiaries, George Kendig did make an affidavit as to his brother's statements and further submitted to the taking of a deposition. The very facts surrounding his relationship to the parties to this action is strong circumstantial evidence as to the truth of his statements.

A further corroboration of Wiley SoRelle Kendig's statement that he had sent in a change of beneficiary is the confidential statement signed by him and kept in the files of his squadron. In this statement he had written that his wife was his beneficiary. This certainly could be interpreted to mean, and is strong evidence when taken with his statements to his wife and to his brother, that he had indeed sent in a form to the Veterans Administration to change beneficiaries from his mother to his wife.

The circumstances surrounding his statements to his wife and to his brother, the signed confidential statement plus the natural inclination of a man to provide for his wife, especially in view of the narrow escape he had had in January 1944, all lend credence to the evidence that he had sent in a change of beneficiary to the Veterans Administration.

Plaintiff believes that a jury could and would reasonably have found that such a change was sent in, and this being so, it was error to direct a verdict for defendants.

The recent cases have almost uniformly upheld the claim of the wife to be declared beneficiary, and in several of these cases, the evidence has been similar to the evidence presented in the present case.

In the case of

Mitchell v. United States
Fifth Circuit
165 Fed. (2d) 758

the facts were like those in the present case. The soldier at the time of taking out insurance was unmarried and named his mother his beneficiary. Subsequently he married plaintiff and after his death the Veterans Administration decided he had never changed beneficiaries. The evidence introduced by the wife to show that he had changed the beneficiary on his insurance to her was very similar to the evidence in the present case. There was testimony by the wife that he told her he was taking out a policy in her name and later asking her if she had received the papers. There was a copy of a Government Insurance Report Form in which the wife was named as beneficiary, the original apparently having been lost, and there was testimony by an officer friend of the decedent to the effect that decedent had said he had changed the beneficiary from his mother to his wife. The Circuit Court upheld judgment for the wife as given by the district court, reported as Rutledge v. United States, 72 Fed. Sup. 352.

The Circuit Court found that decedent had intended to change beneficiaries and had done so. The filling out of the insurance report form strongly corroborated

the testimony of the wife. The decedent intended that his wife should be his beneficiary and thought that he had made her such. The fact that no actual change of beneficiary, nor even the insurance report form was in the government files was held not to be controlling and did not mean that no change was effectuated. Since the original insurance report form was lost by the government, other papers such as the change of beneficiary might also have been lost.

The Court at 165 Fed. (2d) 761 went on to say: "These insurance cases are difficult of decision. Each must be decided in the light of its own facts. The strict law is that a change of beneficiary must be made in writing and in proper form. Where this has not been done, the courts will brush aside technicalities to give effect to the intention of the insured. It is said that a combination of intent and act is required, but to say in these insurance cases that though intention to change the beneficiary is proved to the hilt, no effective formal act having been done no change can be held to have been made, is not to brush technicalities very far aside. If a man possessing the degree of literacy required of an officer in the United States Army Air Corps writes, "I have taken out insurance and I have made you the beneficiary" surely it is subserving technicality to say that this is not sufficient evidence of an exercise of his right to change. True, it is not an actual change but it is strong, almost incontrovertible, *evidence* of a change.

In the case at bar the facts in combination lead irresistibly to the conclusion that the insured, Hardwick, not only intended to make his wife the beneficiary of his insurance, but had also affirmatively acted to make her such."

Plaintiff earnestly submits that where the court on the facts and evidence in the Mitchell case was ir-

resistibly led to find that decedent had acted to make a change, certainly in the present case the jury could reasonably have found from the evidence that Wiley SoRelle Kendig had affirmatively acted to change beneficiaries from his mother to his wife.

In the case of

McKewen v. McKewen, et al.
Fifth Circuit
165 Fed. (2d) 761

the question was again between the wife and the mother as to whether the beneficiary had been changed. The evidence presented by the wife, to show that her husband had changed the beneficiary of his government insurance from his mother to her, was three documents: an officer's data sheet, a government insurance report form and another form similar to the data sheet. On each of these he merely said that his wife was the beneficiary. Nowhere did there seem to be any written request to the Veterans Administration nor did decedent say in so many words to anyone that he had changed his beneficiary.

The court, however, indicated that in view of decedent's statements in these documents, it would be looking at form and overlooking substance to say that there was no statement to indicate he had changed the beneficiary.

The court upheld the judgment of the district court for the wife, saying at 165 Fed. (2d) 765, 766:

"Surely the three official documents signed by the deceased at two different times and places, wherein he stated that his wife was the beneficiary, constituted substantial evidence justifying the Court below in drawing the inference that the insured had done all that he deemed necessary in

order to make his wife—to whom he owed the legal obligation of furnishing support—the beneficiary of his insurance.”

Plaintiff believes that the evidence presented in the present case is fully as strong, if not stronger, than the evidence in the McKewen case as to change of beneficiary.

In the present case, not only was there the statement on a government form that his wife was his beneficiary, but Wiley SoRelle Kendig in addition made statements that he had changed his beneficiary.

If in the McKewen case there was substantial evidence to uphold a judgment for the wife, certainly in the present case the jury could reasonably have found that Wiley SoRelle Kendig had changed the beneficiary of his government insurance from his mother to his wife and where a jury could reasonably have so found, it was error to direct a verdict for the defendant.

The case of

Gann v. Meek
Fifth Circuit
165 Fed. (2d) 857

was between the wife, who was named as beneficiary, and the mother who claimed that decedent had changed the beneficiary from the wife to the mother. The evidence submitted here was a letter written by decedent to his brother in which he said that he had changed his insurance and if anyone gets it his mother would, and the testimony of a marine from a different command, but from somewhat the same area as that in which decedent was killed, that mail was frequently lost. The court also seemed to take judicial notice of the fact that Veterans Administration was swamped with work and many letters were misplaced or lost.

The Circuit Court upheld the judgment of the trial court that the beneficiary had been changed, and at 165 Fed. (2d) 858, 859 said :

“Certainly the evidence presented, when viewed in the light of facts constituting common knowledge, made a jury question as to whether Ervin had done all he reasonably could to effect a change of beneficiary. From this evidence the jury could reasonably have inferred that Corporal Ervin did request the Veterans Administration to change his beneficiary from his wife back to his mother, and that his letter of request was lost * * *.”

Surely the evidence presented in the present case as to the change of beneficiary by Wiley SoRelle Kendig, is stronger than the evidence presented in the Gann case.

In the present case, not only should the plaintiff have been permitted to get in evidence as to the conditions of the files of the Veterans Administration, but the court could have taken judicial notice of this as common knowledge. In addition, in the present case, Wiley SoRelle Kendig not only named his wife as his beneficiary in the confidential report, but he also told his wife he had changed beneficiaries, and also told his brother, a completely reliable witness in view of the circumstances, that he had sent in a form to the Veterans Administration to change beneficiaries.

If a jury could find, and did find, in the Gann case that the beneficiary had been changed, how much more easily and reasonably it could have found a change of beneficiary in the present case! It was, therefore, error to direct a verdict on the grounds of insufficient evidence.

We consider now the case of

Shapiro v. United States
Second Circuit
166 Fed. (2d) 240

which involved the question of a change of beneficiary from the mother to the wife. Evidence was introduced on behalf of the wife to the effect that the decedent had filled out a government form entitled "Designation of Beneficiary" which did not mention insurance, but merely said his wife was primary beneficiary and his mother alternate beneficiary. This form was sent to the War Department and not to the Veterans Administration. Evidence was also offered by testimony that decedent intended to change beneficiaries by the execution of this form, and that he said that he had changed beneficiaries. The district court found that decedent had changed beneficiaries, and on appeal by the mother, the Circuit Court upheld the trial court on the grounds that the findings were supported by substantial evidence and the court went on to say at page 241, *supra*, "*the judgment rendered was not only justified but required by the proof.*" (Emphasis supplied)

Thus, in this case, if there had been a jury, there should have been a directed verdict that decedent had changed the beneficiary of his insurance!

It should be noted also that the court in the Shapiro case is not requiring evidence to the effect that a form to change beneficiaries had been sent in the Veterans Administration. By the testimony in this case, the decedent had never intended to send such a form to the Veterans Administration, but simply intended that the designation of beneficiary act as a change, even though neither insurance nor change was mentioned on this designation. All the Court seems to require is that

the decedent have intended to change beneficiaries and that he have done some act to effectuate his intent.

Applying this line of thought to the present case, the jury could reasonably have found that Wiley SoRelle Kendig intended to change beneficiaries and that the execution of the confidential report naming his wife as beneficiary was the act effectuating this intent.

Another fact should be noted in the Shapiro case. The court commented on the case of

Bradley v. United States
Tenth Circuit
143 Fed. (2d) 573
Cert. denied 323 U.S. 793
65 Sup. Ct. 429

which was a case heavily relied on by defendants at the trial of the present case, and where the majority of the court had held that a confidential report naming the wife as beneficiary was not an act which would effectuate his intention to change beneficiaries, because the report did not express a desire or intent that the beneficiary be changed and was not a direction that the beneficiary be changed. There was a dissent by Judge Phillips, who would have affirmed the judgment of the District Court and held that the execution of the statement was a sufficient act to effectuate the intention to change.

The court in the Shapiro case indicated that each case dealt with the question of whether or not the evidence showed that the decedent had intended to change beneficiaries and had acted to effectuate his intention, and said that if its conclusion differed from the Bradley case as to the law, then the conclusion reached by Judge Phillips in his dissenting opinion

would accord with its own view as to what the proper decision should be.

This is a strong dictum to the effect that a statement of intention to change beneficiaries and the act of naming his wife on a confidential report would be sufficient to support a finding that beneficiaries had been changed.

A case with that factual situation would be weaker than the present case, and therefore a jury could easily and reasonably have found that Wiley SoRelle Kendig had changed beneficiaries from his mother to his wife, and a verdict should not have been directed on the grounds that this was insufficient evidence of a change.

We would like briefly to call attention to the case of

Van Doren v. United States
D.C.S.D. Calif.
68 Fed. Sup. 222

in which the only evidence presented was an army form for designating a beneficiary, which was in the files of the War Department and not addressed to the Veterans Administration. There was no evidence offered as to the soldier's intention. Yet the court held that the instrument spoke for itself, required no explanation of its meaning, and was enough to uphold a finding of a change of beneficiaries. The court commented that it would be strange to deny the change because the instrument was in the files of the War Department and not in those of the Veterans Administration.

The present case is immeasurably stronger because of the expression by Wiley SoRelle Kendig of intent to change and his statements that he had changed beneficiaries.

We wish to refer to the case of

Roberts v. United States
Fourth Circuit
157 Fd. (2d) 906
Cert. denied 330 U.S. 829
67 Sup. Ct. 870

wherein the evidence introduced to show a change of beneficiary consisted of testimony that the deceased and another officer had made a specific trip to change beneficiaries of insurance and other government benefits. No designation of change of beneficiary of insurance was found in the files of the Veterans Administration, but a confidential report filed with his Navy Unit did state that his wife was his insurance beneficiary, and the beneficiary of his bonus. There was some opposing testimony to the effect decedent had said his parents would be taken care of. The District Court held there had been no change of beneficiary, but the Circuit Court reversed the trial court and remanded with orders that it be found that the beneficiary had been changed. Thus, in effect, a verdict should have been directed for the wife.

Certainly if the evidence in the Roberts case warrants a directed verdict for the wife on the grounds the beneficiary had been changed, the evidence in the present case is easily sufficient for the matter to go to the jury on the question of whether or not the beneficiary of his insurance was changed by Wiley SoRelle Kendig.

We also wish to cite several cases from the District Courts which seem to bear up the contention of the plaintiff herein that the present case should have gone to the jury on the question of whether or not Wiley

SoRelle Kendig changed the beneficiary of his government insurance from his mother to his wife.

Rutledge v. United States
D.C.W.D. Louisiana
72 Fed. Sup. 352

Egleston v. United States
D.C.E.D. Illinois
71 Fed. Sup. 114

Walker v. United States
D.C.S.D. Texas
70 Fed. Sup. 422

Citron v. United States
D.C.D.C.
69 Fed. Sup. 830

Woods v. United States
D.C.M.D. Alabama
69 Fed. Sup. 760

In conclusion, plaintiff sincerely submits to the Court that sufficient evidence was introduced at the trial of this matter so that the question of whether or not Wiley SoRelle Kendig changed beneficiaries of his government insurance should have been submitted to the jury, and it was error to direct a verdict on the grounds of insufficient evidence.

Even without the testimony of Ralph E. Palmer, there was sufficient evidence to go to the jury, and with such evidence admitted, or the court's taking judicial notice of the confusion existing in the government records at that time, the case for the jury is that much stronger.

All the probabilities are in favor of the evidence that the beneficiary was changed. It is the normal and expected action that a husband should make his wife his

beneficiary in order to protect her and his unborn child. It is to be expected that a narrow escape in a crash (T-38) would cause him to think of what might happen and then take steps to protect his dependants. Prior to this crash he had expressed the intention to change (T-38). Afterwards, he said he had changed beneficiaries (T-40). About a month later, he told his brother, George Kendig, that he had sent in a form to change beneficiaries (T-58). The use of the term "I sent" certainly implies that he had taken affirmative action to change beneficiaries; it means more than an intent to change.

Because of the circumstances here in speaking against what appears to be the interests of his own mother, in order to tell of the desire of his brother, the testimony of George Kendig deserves great weight.

A further corroboration is the signed statement in the confidential report from the Government files, (T-96-97), which said that his wife was the beneficiary of his government insurance. This confidential report certainly would indicate that he thought his wife was his beneficiary and thus strong corroboration of the statement to his brother that he had sent in a form to change beneficiaries.

It is also plaintiff's contention, as an alternative, that the statement in the confidential report, along with his expressed intention to change beneficiaries, is enough affirmative action so that it could be found that a change of beneficiaries had been made, even though he had sent no form to the Veterans Administration.

As mentioned in *Johnson v. White*, *supra*, *Claffy v. Forbes*, *supra*, and *Walker v. United States*, *supra*, it has long been a policy of the courts to treat with great

liberality the expressed intention of a soldier killed in the service of his country, so as to effectuate his intentions. The trend of the decisions shows that the cases are becoming less and less technical as to the form that must be complied with in order to effectuate the soldier's intentions, and this is rightly so.

Plaintiff respectfully submits that there was no doubt that her husband, Wiley SoRelle Kendig, wanted and intended that she should be the beneficiary of his insurance, and that he took sufficient affirmative action to express and effectuate his intent, so that the matter should have been submitted to the jury as to whether or not he did change beneficiaries.

Plaintiff therefore, respectfully asks, that if it is not found as a matter of law that the beneficiaries had been changed, that this matter be remanded to the District Court for a new trial.

Respectfully submitted,

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IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

PATSY O'ROURKE KENDIG,

Appellant,

VS.

MARY BOONE KENDIG, and
UNITED STATES OF AMERICA,

Appellees.

**Appeal from the United States District Court
for the District of Arizona**

Brief of Appellee
Mary Boone Kendig

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AUG 24 1948

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I N D E X

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IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

PATSY O'ROURKE KENDIG, a widow,
Appellant,

vs.

MARY BOONE KENDIG, a widow, and
UNITED STATES OF AMERICA,
Appellees.

No.
11927

Brief of Appellee

Mary Boone Kendig

In this brief the parties will be referred to by their designations in the District Court, viz: Appellant as plaintiff and appellees as defendants. References to the printed transcript of record will be indicated by the letter "T" followed by numerals denoting the page number.

STATEMENT OF THE CASE

Defendant, Mary Boone Kendig, adds to the plaintiff's Statement of the Case the following:

Patsy O'Rourke Kendig was not definite in her testimony with reference to the statement alleged to have been made by Wiley SoRelle Kendig regarding the change of the beneficiary of his life insurance, and such testimony was received over the objection that it constituted hearsay (T40). She never saw any change of beneficiary form (T41). In March, 1945, she wrote the Bureau of Naval Personnel making inquiry as to whether or not Wiley SoRelle Kendig had changed the beneficiary in his life insurance policy, and in that letter she did not indicate that he had had any conversation with her relating to a change. (T79, 80, 83, 84, 85 and 87).

George Kendig had made an affidavit at the request of Patsy O'Rourke Kendig relating to an alleged conversation with Wiley SoRelle Kendig regarding a change of beneficiary of his life insurance (T70). The affidavit was received in evidence over the objection that it constituted hearsay and covered the same ground as in the affiant's deposition received in evidence (T92, 93).

The deposition of George Kendig was taken in Dallas County, Texas (T78). In his deposition he insisted he was making a deposition on his affidavit (T62, 63, 64), and wanted to read the affidavit as his deposition (T48). At the taking of the deposition, he testified that he couldn't remember anything that was said by Wiley SoRelle Kendig (T53, 54, 67, 68). He testified he couldn't recall any other point in the conversation or why the subject of insurance was brought

up (T60, 72). He couldn't recall whether the conversation was in the day time or at night, and he had no recollection of previous activities of himself and Wiley SoRelle Kendig (T71). In testifying that Wiley SoRelle Kendig told him that he had sent in a form to change his life insurance policy, he said, "I might as well make it that because I am not sure" (T58). The testimony of George Kendig relating to alleged statements of Wiley SoRelle Kendig regarding a change of beneficiary was objected to on the ground that it constituted hearsay (T47). George Kendig never saw any instrument of any kind pertaining to a change of beneficiary (T56).

ARGUMENT

I

The plaintiff has set forth two specifications of errors, namely, that the court erred in refusing to admit the testimony of Ralph E. Palmer, and that the court erred in granting defendants' motion to direct the jury to return a verdict for the defendants. We shall take up these matters in the same order in which they have been set forth by the plaintiff, and shall show that the court did not err in rejecting the proffered testimony of Ralph E. Palmer, and did not err in directing a verdict for the defendants.

Plaintiff produced as a witness Ralph E. Palmer and offered to show by him that some state of confusion existed in the Veterans Administration in Washington in the handling of forms and correspondence (T99). Mr. Palmer's experience with the Veterans Administration began on March 19, 1946, when he was sworn in as an employee in Washington and began a four

weeks training for service in the Phoenix office (T98). The instruction lasted for about two weeks, and then he remained about two weeks around the various departments in the Washington office along with the other students acquainting themselves with the routine (T98, 99). All of this was approximately two years after the death of Wiley SoRelle Kendig, and anything that Mr. Palmer might or could have observed at that time could have no bearing upon any issue in this case.

Obviously it would have been improper for the court to receive the testimony of Mr. Palmer and to permit the jury to consider or speculate upon the same. The testimony was properly excluded, not only because there was no showing that the witness had any knowledge of conditions at or prior to the time of the death of Wiley SoRelle Kendig, but also because such testimony is too vague, general and indefinite to constitute credible evidence, and at most would be but the conclusions of the witness. The plaintiff has cited no case in which testimony has been received to show conditions in the office of the Veterans Administration.

II

Plaintiff's second specification of error is that the court erred in directing a verdict for the defendants.

In view of the indefiniteness of Patsy O'Rourke Kendig regarding the conversation alleged to have been had between Wiley SoRelle Kendig and herself relating to the change of his insurance (T40), and in view of the fact that when she wrote the bureau of Naval Personnel in March, 1945, inquiring as to whether or not he had made any change of beneficiary, she made no reference to any alleged conversations with him relating to same, but referred only to a statement attributed

to George Kendig, it is doubtful whether she had any conversation whatever with Wiley SoRelle Kendig about any such change.

Also, as has been pointed out in this brief, George Kendig, in his deposition, was very vague, indefinite and uncertain as to any conversation alleged to have been had by him with Wiley SoRelle Kendig regarding a change of beneficiary; and while plaintiff argues that the deposition of George Kendig should be given special force because of the fact that he is a son of the defendant, Mary Boone Kendig, yet an examination of the deposition will readily show that for a reason not therein disclosed George Kendig had an obvious desire to build up the plaintiff's case and was definitely hostile, even to the attorney for the defendant, Mary Boone Kendig.

But giving the testimony the most favorable construction for the plaintiff, which, of course, must be done if the testimony is admissible, the court was right in directing a verdict for the defendants.

The plaintiff's proofs at most can establish only that during his lifetime Wiley SoRelle Kendig told his wife, Patsy O'Rourke Kendig, that he had changed his National Service Life Insurance Policy so as to make his wife instead of his mother, Mary Boone Kendig, his beneficiary; and that Wiley SoRelle Kendig in his lifetime told his brother, George Kendig, that he had sent in a form to effect such change of beneficiary. The only other thing upon which the plaintiff might attempt to rely is a confidential personal report, dated February 5, 1944, which Wiley SoRelle Kendig left in his own papers and in which the beneficiary of his insurance was recited to be his wife.

Plaintiff in her brief has set forth the pertinent part of the regulations pertaining to the changing of a beneficiary in a National Service Life Insurance policy, and correctly states that something less than absolute compliance with the regulations may be found sufficient. The plaintiff cites a number of cases to the effect that all that is necessary to change beneficiaries in such policies is for the insured to express clearly his intent to make a change, and for him to take affirmative action to effectuate such intent.

As to the better reasoned cases, we are not in serious disagreement with plaintiff's position in this regard. It must be pointed out, however, that in some of the cases the courts have fallen into the error of admitting letters or statements of the deceased insured as proof of the affirmative action itself, said to have been taken, instead of admitting such letters and statements to prove only an intent on the part of the deceased to take such affirmative action. In other words, some of the courts have failed to recognize that as to the proof of the doing of the alleged act necessary to effectuate a change of beneficiary, the statements and letters of the insured constitute hearsay and are inadmissible. With this observation in mind, let us examine the cases, most of which have been cited in plaintiff's brief.

The only case found which appears identical with the case at bar is

Bradley v. United States, et al,
143 Fed. (2d) 573, (decided May
30, 1944), Circuit Court of Ap-
peals of the Tenth Circuit.

There the mother of the naval flier officer was named beneficiary. Later the insured married. After his

death there was found in his papers a confidential personal report required of all flying officers, dated the day before his death, in which he stated that he had government insurance in the amount of \$10,000.00 and that his wife was the beneficiary.

At the trial of that case the wife testified, over objection, that the insured discussed his insurance with her prior to his death and had expressed his intention of changing the beneficiary to her when he got to March Field, and that he later informed her that "he had taken care of the insurance at the army base." (143 Fed. (2d) 574).

The court found in the Bradley case that the undisputed evidence fully supported the findings of the district court that the insured intended to change the beneficiary of his insurance from his mother to his wife, and then the court added:

"But the principle which actuates the courts in giving effect to the ascertained intentions of the insured has application only where the party has attempted to act for himself. * * * We can only liberally construe that which he has attempted to do in his own behalf, but for some reason has failed to accomplish the desired or intended result. This is a fundamental rule of equitable jurisprudence which guides and directs equitable proceedings." (143 Fed. (2d) 576, 577).

It was argued that the confidential personal report in the Bradley case constituted not only an expression of the insured's intention but also an attempt to change the beneficiary from his mother to his wife. But the court refused to give it such effect saying:

"At most it indicates a belief or understanding that his wife was the then present beneficiary.

When given its most liberal construction in the light of all the facts and circumstances, we are convinced that it cannot be treated as an effectuation of the insured's intention to change his beneficiary." (143 Fed. (2d) 577).

It will be noted that the case at bar is a direct parallel with the Bradley case.

In the Bradley case, there was a dissenting opinion filed by Judge Phillips in which he held that the making of the confidential personal report and the delivery of the policy of insurance to his wife should effect the change of beneficiary. It will be noted that in the case at bar the policy of insurance was not delivered to the plaintiff, Patsy O'Rourke Kendig, but was left by Wiley SoRelle Kendig with his mother, Mary Boone Kendig (T97); so even under the dissent of Judge Phillips one of the elements necessary to have shown a change of beneficiaries is lacking in the instant case.

A more recent case has been decided by the Tenth Circuit Court of Appeals, namely,

Collins v. United States, et al,
161 Fed. (2d) 64, (decided
March 17, 1947).

In that case the insured went to the office of personal affairs of his camp, secured regular form number 336 furnished by the Veterans Administration for effecting a change of beneficiary, had an employee of the office fill out the form, signed it in duplicate and took both with him. He was an officer and kept one in his desk at the field; the other he showed to his wife, told her what it was and told her if anything happened to him to give it to her father who would know what to do with it. It was then left in a desk at the home

where he and his wife lived. After his death, the change of beneficiary form was first sent to the Veterans Administration.

The court in the Collins case said that the very narrow question in the case was whether it was necessary to send in the change of beneficiary form during the insured's life; and the court held that same was merely a ministerial act and unnecessary to effect the change, and particularly where, as here, the government in its brief had waived any requirement of the regulation that the change be filed with the Veterans Administration. Obviously the Collins case is consistent with the Bradley case.

In the case of

Shapiro v. United States, et al,
166 Fed. (2d) 240, (decided
March 4, 1948), Circuit Court of
Appeals of the Second Circuit,

it was held that a change of beneficiary had been effected where the insured, shortly after marrying, had gone to his battalion adjutant, notified him of his marriage, stated that he wished to change the beneficiary on his policy from his mother to his wife, had been given War Department AGO Form No. 41, entitled "Designation of Beneficiary," which the insured had filled out naming his wife as primary beneficiary and his mother as alternate beneficiary, and which he had left with the adjutant for forwarding. The form actually was intended for use in designating the beneficiary of the so-called six months gratuity, but the adjutant testified that he did not know there was another form.

In reaching its conclusion that a change of beneficiary had been effected, the court in the Shapiro case

relied upon *Collins v. United States*, supra, *Roberts v. United States*, 157 Fed. (2d) 906, *Kachefsky v. Kachefsky*, 110 Fed. (2d) 836, *Claffy v. Forbes*, 280 Fed. 233, *Egleston v. United States*, 71 Fed. Supp. 114, and *Citron v. United States*, 69 Fed. Supp. 830, and the *Bradley* case, supra; and in discussing the *Bradley* and *Collins* cases, decided by the same court, said that each decision dealt with the question whether the evidence in the particular case showed that the insured had performed an act with the intent to change his beneficiary, and the *Bradley* decision held that he had not and the *Collins* decision that he had. The court then said:

“We cannot say that either decision differs as a matter of law from the other decisions we have cited, or from the conclusion we have reached in the case at bar.” (166 Fed. 2d) 242).

In two other cases cited by plaintiff, the insured through error also had used the wrong form, namely, War Department AGO Form No. 41, in attempting to change the beneficiary. Those two cases are

Citron v. United States, et al,
69 Fed. Supp. 830 (decided January 29, 1947 by D.C., D.C.) and
Woods v. United States,
69 Fed. Supp. 760 (decided Jan. 30, 1947 by D.C.M.D. Alabama)

In the *Citron* case the insured went to the Finance Office of his camp and requested the clerk in charge to give him a form in order that he might change the beneficiary of his National Service Life Insurance to his wife. W.D. AGO Form No. 41 was given him and he filled it out and left it for forwarding. It was forwarded to the War Department and found after his

death. The officer in charge of the insurance program of the War Department testified that army officials, at home and abroad, used that form for changing the beneficiaries on insurance. The court held that he had done everything which reasonably could be expected of him to accomplish his purpose and that the change was effected.

In *Woods v. United States*, *supra*, the intent to change the beneficiary was amply shown and the insured executed the Form No. 41 believing that it was the form required for the change; and the court properly again held that he had done all that could be expected of him.

In the case of

Mitchell v. United States,
165 Fed. (2d) 758, (decided
January 14, 1948), Fifth Circuit
Court of Appeals,

the insured had named his mother as beneficiary and later married. The widow testified that on her wedding day he told her he was taking out a policy in her name. Before going over seas the insured, as a part of his processing, filled out a Government Insurance Report Form on which he filled in his wife's name as that of beneficiary of his insurance. The report was filed with the War Department and a copy sent by it to his wife.

In conversations and in correspondence, the intent of the insured in the *Mitchell* case to make his wife the beneficiary was clearly expressed. The court pointed out that the mere intent to change the beneficiary is not sufficient, and that such an intent must be followed

by some affirmative act on the part of the insured, evidencing an exercise of the right to change the beneficiary. The court said that these cases are difficult of decision, but it held that the insured had affirmatively acted to make his wife his beneficiary and held that the beneficiary had thus been changed. The same case in the District Court is reported as

Rutledge v. United States, et al,
72 Fed. Supp. 352,

and in the District Court's opinion the court stressed the fact that a fellow officer saw the insured sign the Government Insurance Report Form in which he named his wife as beneficiary.

In the case of

McKewen v. McKewen, et al,
165 Fed. (2d) 761,
(decided January 23, 1948)
Fifth Circuit Court of Appeals,

the court in reaching its conclusion said that the case was controlled by the opinion of that court rendered January 14, 1948 in Mitchell v. United States, *supra*.

In the McKewen case the insured, after his marriage and while in camp in Nebraska, filled out two official forms furnished by the government known as Officer's Data Sheet and Government Insurance Report Form. In each of these he showed his wife as the beneficiary of his \$10,000.00 policy and delivered same to the Government and the Government sent a duplicate to his wife. Later, at his base in England, the insured filled out Officer's Data Sheet in which he again stated that his wife was the beneficiary of his insurance.

The court points out in the McKewen case that these forms were executed pursuant to army orders, rules or regulations and that the Veterans Administration accepted the Government Insurance Report Form and the Officer's Data Sheet as a valid change of beneficiary. The court said that these were official documents and:

“The declarations in these documents are not in the category of unofficial, ex-parte, or oral statements made to the wife or to the mother in response to inquiries, or in answer to protests against the making of someone the beneficiary.” (165 Fed. (2d) 764).

In the case of

Gann, et al, v. Meek, et al,
165 Fed. (2d) 857, (decided
January 27, 1948), Circuit Court
of Appeals of the Fifth Circuit,

the policy originally named the mother as beneficiary; then the insured marine married and by the use of the regular form for that purpose had the beneficiary changed to his wife. In this action the mother claimed that she again had been made beneficiary. The marine, while somewhere in the Pacific, wrote his brother in the United States stating in effect that he had again made his mother the beneficiary. The court apparently was much impressed by the fact that the marine was in an area of heavy fighting in the South Pacific and that another marine testified as to the great amount of confusion, irregularity of mail and loss of mail due to war conditions, and the court commented that the marine had once previously changed his beneficiary so he knew what forms were required.

The majority of the court in the Gann case then held that a change of beneficiary had been effected. A strong dissenting opinion was filed by Judge Sibley. In that dissenting opinion, it was correctly pointed out that the letter of the marine to his brother is hearsay and should have been excluded and a verdict directed.

The case of

Egleston v. United States, et al,
71 Fed. Supp. 114, (decided
April 18, 1947), District Court
of the Eastern District of Illinois,

is a case in which the insured instead of writing the Veterans Administration wrote his wife, after sailing for the Pacific, directing her to have his insurance so changed that she would be the beneficiary. The wife instead of sending her husband's letter to the Veteran's Administration, wrote it and it refused to make the change on her request. After the soldier's death, the letter was sent to the Veterans Administration. The court was of the belief that the letter constituted a sufficient notice of change of beneficiary, and the fact that the wife did not send it to the Veterans Administration during his lifetime was immaterial.

The case of

Roberts v. United States,
157 Fed. (2d) 906, (decided
November 11, 1946),
Fourth Circuit Court of Appeals,

is relied upon by the plaintiff, but in that case the insured and a fellow officer, who had been married the same day, went to the office where the officers' records were kept at the Naval Air Station and stated that they

wished to change their insurance policies to make their wives the beneficiaries. Each of the men was furnished a set of forms to fill out, and the clerk agreed to take charge of the papers and put them in the proper channels. The two officers stood side by side and made out the forms, and the other officer saw the deceased change the beneficiary to his wife. The form was not found in the Veterans Administration. A confidential form was found in the Navy records in an envelope sealed by the deceased. There was also a card in his handwriting in which he said his wife was his beneficiary. This was an official record kept with the records of the squadron from the entry of the officer therein until his transfer. The court held that a change of beneficiary had been effected.

The court in the Roberts case after pointing out all of the foregoing said:

“In the pending case, we have found that the insured not only expressed his intention to change the beneficiary in the policy, but also set in motion the machinery devised by the United States to accomplish the desired result. In this way he performed the affirmative act for the lack of which the majority of the court in the Bradley case concluded that the change of beneficiary had not been accomplished.” (157 Fed. (2d) 909).

Likewise, in

Johnson v. White, et al,
39 Fed. (2d) 793,
(decided in 1930)
Eighth Circuit Court of Appeals,

the insured went to the Company Headquarters and asked to have his insurance policy changed so that his wife would be the beneficiary, and the officer said:

“Give us your wife’s name and we will have it changed,” (39 Fed. (2d) 795);

and the insured gave the officer his wife’s name and address. The court found that in view of the fact that he had applied to the officers in charge of that branch of the service, had requested them to make the change, and was there given what seemed to him assurance that the change had been or would be made, the change should be effected.

In the case of

Walker v. United States, et al,
70 Fed. Supp. 422,
(decided February 21, 1947),

the District Court of the Southern District of Texas found that letters sent the wife by the insured, both while in the states and abroad, showed clearly that he intended his wife to be the beneficiary. The “Report of Death” made by the Adjutant General of the War Department to the Veterans Administration showed his wife as beneficiary. Some of the letters of the insured to his wife had indicated that he had taken steps to change his beneficiary. The District Court concluded that the information regarding the wife being the beneficiary must have come to the War Department from the insured, and that circumstantial evidence showed that a change of beneficiary had been made.

The case of

Van Doren v. United States, et al,
68 Fed. Supp. 222, (decided
October 4, 1946), District Court
of the Southern District of
California,

was one wherein the insured was single when he took out his insurance, made his father the principal beneficiary, later married and executed a paper entitled "Designation or Change of Address of Beneficiary" in which he stated that his wife was his beneficiary. The widow upon his death brought action against the United States, and against the father who was named the principal beneficiary and the sister who was named contingent beneficiary in the insured's policy. Neither the father nor the sister appeared nor defended but only the Government defended.

The court in the Van Doren case said it was difficult to follow the reasoning of the Government, which alone defended, in view of the fact that the Government had produced the document at the trial and turned it over to the widow. Apparently the court was impressed by the fact that neither the father nor the sister contested the widow's case and that the Government should not make any point of the form of the document or where it was filed, that is, whether with the War Department or the Veterans Administration.

The case of

Ramsay v. United States, et al,
72 Fed. Supp. 613, (decided
July 31, 1947), District Court of
the Southern District of Florida,

held that a change of beneficiary had not been effected. The court pointed out that the insured was in the United States for many months before being sent into the Pacific area and stated:

"It would have been very easy for the insured at any time between February, 1943 and his departure from Jacksonville to the Canal Zone and

to the West Coast to have taken the certificate of insurance and sent it to the Veterans Administration and had a change of beneficiary entered thereon, if he had desired or dared to do so. The record contains no evidence upon which the court would be justified in holding that insured did everything in his power to effectuate a change of beneficiary.” (72 Fed. Supp. 616).

This court, in

Leahy v. United States,
15 Fed. (2d) 949,
(decided in 1926),
Ninth Circuit Court of Appeals,

in an action by a widow against the United States and a sister of the insured to recover on a War Risk insurance policy which was taken out when the insured was single, held that a change of beneficiary in favor of the widow had not been made out, although a copy of what purported to be a letter to the Veterans Bureau was found in the insured's files after his death, and in which letter it appeared that he had asked for the change of beneficiary. But the court pointed out that he had lived for two years after the date of the alleged letter and had done nothing further about making a change, and the letter was not received by the department, and there was no proof of mailing.

The case of

Kingston v. Hines,
13 Fed. (2d) 406, (decided in
1926), District Court of the
Western District of Michigan,

and cited with approval in the Bradley case, contains one of the clearest enunciations of the law relating to hearsay testimony in cases such as the one at bar. In that case the soldier had designated his wife as beneficiary. He had some marital difficulties with his wife and he wrote his mother indicating clearly his intentions to make his mother his beneficiary in place of his wife on his War Risk insurance policy. Later he wrote his mother in substance that he had made the change. These letters constituted the evidence claimed by the mother to establish a change of beneficiary. In holding that the letters were not admissible as proof of the alleged affirmative act the court said:

“An examination of the authorities convinces the court that the letter of August 1, 1918, is inadmissible to establish the alleged fact of change of beneficiary. It is subject to all of the infirmities of hearsay evidence. It amounts to no more than a declaration by a deceased person that he had changed a beneficiary. Such a statement does not fall within any of the recognized exceptions to the rule denying the admissibility of hearsay evidence.” (13 Fed. (2d) 407, 408).

CONCLUSION

An endeavor has been made to analyze all of the cases found which it was felt would be helpful in determining the case at bar.

It will have been noted that the only case parallel to the instant one is the Bradley case.

It also will have been noted that in practically all of the cases wherein a change of beneficiary was held to have been effected not only was there clearly shown the intent of the insured to make the change, but also it was

established by competent evidence that the insured by affirmative act had done all that he reasonably could under the circumstances.

In *Shapiro v. United States*, *Woods v. United States*, and *Citron v. United States* he had been furnished with and had used Form No. 41, instead of Form No. 336.

In *Collins v. United States* he had made out the correct form, but it wasn't filed with the Veterans Administration until after the insured's death. The insured used the wrong Designation of Change of Beneficiary in *Van Doren v. United States*. In *Egleston v. United States* the insured sent the letter directing change of beneficiary to his wife instead of the Veterans Administration, and it was not sent to the latter until after the insured's death.

In *Johnson v. White* the insured went to Company Headquarters, told the officer in charge that he wanted his wife made the beneficiary of his insurance, gave the information requested and went away with the assurance the change was made.

In *Roberts v. United States* the correct form was clearly shown to have been executed by the insured and left in proper military channels for forwarding.

Mitchell v. United States and *McKewen v. McKewen*, while not as clear cut as the other cases above mentioned, are ones in which the insured, by official documents filed with the War Department and by the latter also served upon the wife, named the wife as beneficiary.

Gann v. Meek and *Walker v. United States* do not appear to be supported by clear reasoning or sound principles. In the former, the dissenting opinion is in

line with the holdings in the great majority of the other cases.

In the case at bar, there is no admissible evidence that Wiley SoRelle Kendig ever took one affirmative step to change his beneficiary. He executed no form. He applied for no change through the Navy or other channels. He wrote no letters requesting a change. He was in the United States, located in New Jersey. As some of the courts have pointed out, it would have been an easy matter for him, or one in his position, to have made the change had he desired to do so.

There was not even produced a single letter showing that he intended to make the change. Whether he at times thought of making his wife his beneficiary in the place of his mother but could not bring himself to do it, no one ever can know. But of this we may be sure—he left no change of beneficiary of any kind that has been found in the more than four years since his death; and no one, in or out of the military service, has been found who says he saw the insured take any step whatever to effect a change of beneficiary, or that the insured ever asked for or received any form for such change, or stated to any officer or clerk in the Navy or the Veterans Administration that he desired to make a change.

The record, then, is wholly barren of any evidence from which it might be found that Wiley SoRelle Kendig took the required affirmative step to change his beneficiary, and the Court correctly directed the

verdict for the defendants. The judgment should be affirmed.

Respectfully submitted,

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No. 11927

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

PATSY O'ROURKE KENDIG,

Appellant,

VS.

MARY BOONE KENDIG, and
UNITED STATES OF AMERICA,

Appellees.

Appellant's Closing Brief

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IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

PATSY O'ROURKE KENDIG, a widow,
Appellant,

vs.

MARY BOONE KENDIG, a widow, and
UNITED STATES OF AMERICA,
Appellees.

No.
11927

APPELLANT'S CLOSING BRIEF

I.

Defendant, Mary Boone Kendig, on pages 4 and 5 of her brief, raises the point that because plaintiff did not mention in her letter of March 1945 to the Bureau of Naval Personnel that she had had a conversation with her husband, Wiley SoRelle Kendig, in which he said he had changed the beneficiary of his insurance, that it is doubtful whether she had such a conversation with him regarding a change of beneficiary.

This doubt on the part of defendant is pure surmise and has no evidence to support it. We wish to point out that plaintiff sent an affidavit to the Veterans Administration in support of her claim to be benefi-

iary of the insurance of her husband, Wiley SoRelle Kendig, and in this affidavit she stated on oath that Wiley SoRelle Kendig had told her that she was his beneficiary, and his statement was made to her in the presence of a witness (T-88, 90, 91).

Defendant on page 5 of her brief also raises the point that George Kendig in his deposition was vague and uncertain and had an obvious desire to build up plaintiff's case. We can find no desire on the part of George Kendig other than the desire to tell the truth regarding the statements made to him by his brother, Wiley SoRelle Kendig, and he testified that he was not interested in any way in the outcome of the suit (T-72). Reading over his testimony, one is impressed by the fact that he is doing his best to remember and truthfully express statements made to him more than three years before. Any hostility he may have shown toward defendant's attorney was due, no doubt, to the irritating manner of questioning used by this attorney and his insinuations regarding George Kendig's truthfulness.

Defendant at page 21 of her brief is assuming one of the principal points of the present case where she says that Wiley SoRelle Kendig executed no form, applied for no change, and sent no letters requesting a change. On the contrary, there is testimony that Wiley SoRelle Kendig stated he had sent in a form to change beneficiary, and it is plaintiff's contention that this form was lost in the confusion of war. Wiley SoRelle Kendig wrote no letter to his wife showing his intention to make her his beneficiary for the reason that they were living together from the time of their marriage until his death, and there was no reason for him to write to her (T-37-42).

Since the case was decided on directed verdict, the evidence as presented should be taken in its strongest possible light for the plaintiff, even if there had been controverting testimony, and there was no evidence here to controvert the truthfulness of these witnesses.

II.

Defendant at pages 6, 18 and 19 of her brief raises the point that letters and statements made by the deceased insured are hearsay and inadmissible as proof of an act done to effectuate his intent to change beneficiaries.

It is plaintiff's view that the hearsay rule is not as strictly applied to cases involving government insurance as it may be applied in other types of cases, and also that the evidence in this case falls within the principles under which exceptions to the hearsay rule are admitted, these principles being necessity and circumstantial guaranty of trustworthiness.

Wigmore On Evidence
Vol. 5, par. 1420 et seq.

In the case of

Ambrose v. United States, et al.
D.C., W.D.N.Y., 1926
15 Fed. (2d) 52

where the issue involved beneficiaries of government insurance, the court held that letters and statements made by the deceased insured were admissible.

In the case of

United States v. Wescoat
Fourth Circuit, 1931
49 Fed. (2d) 193, 196

involving the admission of hearsay evidence in a gov-

ernment insurance case, the court admitted the evidence and said,

“The hearsay rule is important, but courts should not hesitate to recognize exceptions to it where such exceptions fall within recognized principles and are necessary to the ascertainment of truth and the doing of justice.”

The objection which defendant has raised would apply equally as well to many of the cases cited in both plaintiff's opening brief and in defendant's brief, yet there has been no hesitancy on the part of these courts to admit this evidence and to rely on it in reaching their decisions.

There are, no doubt, two main reasons for permitting evidence of this nature in cases involving deceased soldiers. First, there is the policy which has been stated by many courts in numerous decisions, that the expressed intentions of deceased soldier should be treated with great liberality so as to give effect to these intentions, even though all formalities have not been complied with; and second is the fact that evidence of this nature is frequently the only evidence available as to the deceased soldier's intentions, desires and purposes. There is, therefore, the necessity for the admission of such evidence, and there is great guarantee of the truthfulness of the evidence when testimony of witnesses is corroborated by other witnesses and also by a written declaration of the deceased soldier. Exclusion of such evidence on the ground it is hearsay, where it is the only evidence available and where there is strong guaranty of its truthfulness, would not be going very far in the direction of treating the soldier's intentions with liberality so as to give effect to these intentions.

In the present case the evidence is necessary, being the only evidence available, and there is ample corroboration as to his intention to change, and his belief that he had done so. There were two witnesses who testified that Wiley SoRelle Kendig had declared that he had sent in a form to change beneficiaries and his own written statement that his wife was his beneficiary. Truly, there can be no doubt that Wiley SoRelle Kendig wanted to change, intended to change, and believed that he had changed the beneficiary of his government insurance.

It is to be noted that in the case of
 Bradley v. United States
 Tenth Circuit, 1944
 143 Fed. (2d) 573

on which defendant heavily relies, the court without commenting on the objection to the admission of testimony as to statements of deceased, allowed such evidence to be admitted.

The Bradley case, *supra*, cited with approval
 Kingston v. Hines
 D.C.W.D. Mich., 1926
 13 Fed. (2d) 406

as commented on in defendant's brief at page 19, but this was on another point and was not on the point of admissibility of evidence.

It seems clear from an inspection of the cases that the courts have admitted evidence of the type offered in the present case and have accepted the validity of such evidence to show intent to change and the acts in furtherance of this intent where government insurance is involved.

III.

Defendant has in her brief made much of a purported distinction between the Form 41, entitled "Designation of Beneficiary," the Government Insurance Report Form, and the confidential statement required for men in the flying services. We believe that insofar as the evidentiary value is concerned relative to a change of beneficiary, there is no difference among these three forms. The Form 41, the insurance report form, and the confidential statement all name the person the soldier believes is the beneficiary. The Form 41 and insurance report form are sent to the War Department and the confidential statement is kept with the squadron files, but none of these forms is a writing addressed to the Veterans Administration requesting a change of beneficiary. All are merely forms which the government requires and on which is noted the person the soldier believes to be his beneficiary. All are strong evidence when in conjunction with statements by the soldier that he has sent in a form to change his beneficiary, that such a change has been made and that the soldier believes that the person named is his beneficiary.

On page 12 of defendant's brief, an attempt is made to distinguish the case of

Mitchell v. United States
Fifth Circuit, 1948
165 Fed. (2d) 758

on the grounds the District Court had stressed that a witness had seen the deceased soldier sign the insurance report form naming his wife as beneficiary. The fact that his signature was witnessed adds nothing to the case, for there has been no doubt at all raised in the present case that Wiley SoRelle Kendig did not

sign the confidential statement. The court in the Mitchell case, *supra*, with facts very similar to the present case said in very clear language that the statement by an officer in the Air Corps that he had changed his beneficiary is *strong and almost incontrovertible evidence of a change of beneficiary*.

Defendant on pages 16 and 17 of her brief in discussing the case of

Van Doren v. United States
D.C.S.D. Calif., 1946
68 Fed. Sup. 222

says that apparently the court was impressed by the fact that the wife's case was not contested by decedent's father and sister. This should make no difference, for the wife would still have to present a *prima facie* case that there had been a change and where such a case is presented the question should go to the jury even though the father and sister had appeared and contested the wife's claim.

On page 18 of her brief defendant cites the case of

Leahy v. United States
Ninth Circuit, 1926
15 Fed. (2d) 949

in which the deceased lived for two years after the date of a letter which was alleged to have been sent to the Veterans Administration requesting a change of beneficiary. In the present case, Wiley SoRelle Kendig was killed within two months or less of the time in which it is claimed he sent in a form to change beneficiaries, and in this short space of time, he would have had no reason to become suspicious at not hearing from the Veterans Administration acknowledging receipt of his form.

Plaintiff wishes also to point out that in the Leahy case, where there was testimony to the effect that deceased insured had said he intended to change beneficiaries and an unsigned copy of a letter to the Veterans Administration was found among his papers, the court held that the case was one for determination of the court on the preponderance of the evidence. Thus if there had been a jury, it would have been for determination of the jury, and not a directed verdict.

Defendant has relied most heavily on the case of *Bradley v. United States*, supra, discussed at pages 6, 7 and 8 of defendant's brief, particularly on the decision by a majority of the court that the confidential statement signed by deceased was not sufficient, along with his statements of intention to change, to cause a change of beneficiaries.

It is plaintiff's contention that the dissenting opinion of Judge Phillips in the *Bradley* case accords more nearly with the view taken by the courts in the later decisions regarding changes of beneficiaries of government insurance.

It is to be noted that several later cases have distinguished the *Bradley* case on the facts and have found that the beneficiary was changed in accordance with the deceased soldier's intentions.

In the case of

Shapiro v. United States
Second Circuit, 1948
166 Fed. (2d) 240, 242

the court clearly indicated that if it came to the place where it could not distinguish the *Bradley* case on the facts, then it would favor the view as taken in the dissenting opinion of Judge Phillips.

The court in

Roberts v. United States
Fourth Circuit, 1946
157 Fed. (2d) 906, 909

found that the affirmative act lacking in the Bradley case was performed, and it therefore would not be necessary to consider the view as presented by Judge Phillips in his dissent. The implication here is that this court would have seriously considered Judge Phillip's views.

Plaintiff earnestly submits to this court the view that there was sufficient evidence that Wiley SoRelle Kendig intended to change, did change, and believed that he had changed the beneficiary of his insurance from his wife, so that it was error for the trial court to direct a verdict for the defendant.

Respectfully submitted,

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No. 11928

United States
Circuit Court of Appeals
For the Ninth Circuit.

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Appellant,

vs.

PEARL ROSE,

Appellee.

Transcript of the Record

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division

FILED

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PAUL P. O'BRIEN,

No. 11928

United States
Circuit Court of Appeals
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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States,
Southern District of California, Central
Division

No. 6827-PH

PHILIP B. FLEMING, Administrator, Office of
Temporary Controls, Office of Price Admin-
istration,

Plaintiff,

vs.

PEARL ROSE, DOE I and DOE II,
Defendants.

COMPLAINT FOR TREBLE DAMAGES AND INJUNCTION

For a First Cause of Action

I.

Plaintiff, as Administrator of the Office of Temporary Controls, Office of Price Administration, brings this action for injunction pursuant to Section 205(a) to enforce compliance with Section 4 and for treble damages on behalf of the United States of America pursuant to Section 205(e) of the Emergency Price Control Act of 1942, as amended, USCA Title 50, App. Sec. 901 et seq., hereinafter referred to as "The Act," and the Rent Regulations (10 Fed. Reg. 13528) issued by the Administrator pursuant to Section 2 of the Act.

II.

Jurisdiction of this action is conferred upon this Court by Section 205(c) and 205(e) of the Act. [2]

III. .

At all times mentioned herein, there has been and now is in effect a Rent Regulation for Housing issued pursuant to Section 2(b) of the Act for the Los Angeles Defense Rental Area.

IV.

That the defendants, Doe I and Doe II, are the fictitious names of the defendants, whose true names are to this plaintiff unknown, and plaintiff asks that when these true names are discovered this complaint may be amended by inserting such true names in the place and stead of such fictitious names. Wherever the word "defendant" is used in this complaint, it shall include all of the defendants individually and collectively herein sued.

V.

That the defendant is a resident of the City of Los Angeles, County of Los Angeles, State of California, in the Southern District of California, in the Central Division thereof, and within the jurisdiction of this Court.

VI.

During all times herein mentioned defendant has received rent for the use and occupancy of those certain housing accommodations, subject to said Housing Regulation within said Defense Rental Area, known and described as 2968½ Francis Avenue, 2970 Francis Avenue and 2972 Francis Avenue, City of Los Angeles, County of Los Angeles, State of California.

VII.

That on and since March 3, 1946, exclusive of the period July 1 to July 25, 1946, inclusive, the defendant has received for the use and occupancy of the housing accommodations hereinbefore described, rents in excess of the maximum rents permitted under the said Rent Regulations and Orders of the Rent Director; that the number and names of tenants and the amount of overcharges are facts peculiarly within the knowledge of said defendant; that plaintiff is unable at this time, to allege with certainty the [3] Amount of rents charged in excess of said maximum rent but that plaintiff upon ascertaining the amount or amounts thereof, and the names of said tenants, will ask leave to amend this complaint and set forth the amount or amounts of said overcharges and the tenants from whom said overcharges were received.

VIII.

That every tenant overcharged as above alleged has failed to institute an action pursuant to Section 205(e) of said Act, and more than thirty days have elapsed since the occurrence of the violations.

For a Second Cause of Action

I.

Plaintiff re-alleges each and every allegation contained in Paragraphs I, II, III, IV, and V of Plaintiff's first cause of action as though fully set forth herein.

II.

Defendant is now and has been engaged in acts and practices which constitute violations of Section 4(a) of the Emergency Price Control Act of 1942, as amended, (USCA, Title 50, App. 901-946 et seq.), hereinafter called "The Act," in that defendant has violated and is now still violating the provisions of the Rent Regulation for Housing (10 F.R. 13528) as amended, issued in accordance with the provisions of Section 2(b) of the Act; and therefore pursuant to Section 205(a) of the Act, the Administrator brings this action to enforce compliance with said regulation. Jurisdiction of this action is conferred upon the Court by Section 205(c) of the Act.

III.

Said Rent Regulation for Housing has been in effect in the Los Angeles Defense-Rental Area at all times herein mentioned. Defendant is the landlord and operator of certain accommodations subject to said Regulation for housing accommodations, within [4] said Area, including housing accommodations at 2970 Francis Avenue, 2972 Francis Avenue, and the apartment situated on Francis Avenue in the rear of Apartment number 2972, in the City of Los Angeles, County of Los Angeles, State of California.

IV.

Said Rent Regulation for Housing provides, with certain exceptions not herein material, that on or before December 16, 1942, or within thirty days

after the housing accommodations were first rented, whichever is later, each landlord of such housing accommodation subject to said Regulation must file with the Administrator a written statement on a form provided therefor, containing such information as the Administrator requires, to be known as a "Registration Statement." Pursuant to this provision the Administrator has provided a form of Registration Statement and has required that such statement correctly set forth all established maximum rents for all housing accommodations subject to said Regulation.

V.

Defendant, after December 16, 1942, has rented and offered for rent certain housing accommodations subject to said Regulation as set forth above and has not filed Registration Statements correctly setting forth all maximum rents established for said housing accommodations, namely 2970 Francis Avenue, 2972 Francis Avenue, and the apartment situated on Francis Avenue in the rear of apartment number 2972, in the City of Los Angeles, County of Los Angeles, State of California.

For a Third Cause of Action

I.

Plaintiff re-alleges and incorporates herein Paragraphs III, IV, V, VI, and VII of his first cause of action, and Paragraph II of the second cause of action. [5]

Wherefore, the plaintiff demands:

A. Judgment for the plaintiff to recover of the defendant treble the total amounts received by the defendant from persons as rent for the use and occupancy of the housing accommodations described in the complaint, which were in excess of the maximum rents established by the Act and regulations issued thereunder, and further that;

B. The defendant be ordered and directed to tender to all available persons named in the schedule attached hereto as are entitled thereto a refund of all amounts in excess of the maximum rents established by the Act and regulations issued thereunder which were received by the defendant, his agents, employees and attorneys from said persons as rent for the use and occupancy of the housing accommodations described in the complaint, since the date maximum rents were established therefor by said regulation, provided that refunds made by the defendant to such persons in compliance with the directions of the Court for rents received within one year prior to the bringing of this action, shall be deducted from the amount of the judgment prayed for in the preceding paragraph A.

C. A temporary restraining order, preliminary and final injunction requiring the defendant to file with the Administrator Registration Statements in the form prescribed by the Administrator correctly setting forth the maximum rents heretofore or hereafter established for all housing accommodations subject to said Rent Regulation for Housing heretofore or hereafter rented or offered for rent by said

defendant, particularly accommodations located at 2970 Francis Avenue, 2972 Francis Avenue, and the apartment situated on Francis Avenue in the rear of apartment number 2972, in the City of Los Angeles, County of Los Angeles, State of California.

AUSTIN CLAPP,

WADIEH S. SHIBLEY,

ABE I. LEVY,

By /s/ FRANK L. HIRST,

Attorneys for Plaintiff.

[Endorsed]: Filed April 18, 1947. [6]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT FOR TREBLE
DAMAGES AND INJUNCTION

Comes now the defendant Pearl Rose and for her answer to complaint of the plaintiff admits, denies or alleges as follows, to wit:

I.

Denies generally and specifically allegation VII of plaintiff's complaint and each and every part thereof.

II.

The defendant alleges that she has not sufficient information and belief to enable her to answer allegation VIII of plaintiff's first cause of action, and placing her denial upon such want of information and belief, denies said allegation of said complaint.

And for Her Answer to the Plaintiff's Second Cause of Action, this defendant admits, denies or alleges as follows, to wit:

I.

Defendant denies allegations II, III, IV and V thereof, and [7] each and every part of said allegations of said second cause of action.

And for Her Answer to Plaintiff's Third Cause of Action, the defendant denies, admits or alleges as follows, to wit:

I.

Defendant denies generally and specifically allegation I of said third cause of action in the same manner and with the same force and to the same effect as her answers to the allegations re-alleged therein in the prior causes of action to which they refer, it being her purpose hereby to deny any issues that may be raised by said third cause of action.

Wherefore, the defendant prays that the plaintiff take nothing by reason of his alleged causes of action and that this defendant may go hence without day.

/s/ HIRAM T. KELLOGG,
Attorney for Defendant,
Pearl Rose.

[Affidavit of service by mail attached.]

[Endorsed]: Filed May 12, 1947. [8]

MEMORANDUM OF FACTS AND SUMMARY OF POINTS OF LAW

Statement of Facts

Plaintiff will prove the following schedule:

Unit	Tenant's Name	Period of Occupancy	Rent Collected	Maximum Legal Rent	Amount of Overcharges
2968	Charles L. Logan—Mar. 3, 1946.....			Bonus	\$100.00
2968	Charles L. Logan—Mar. 3, 1946 to Jan. 1, 1947.....		\$12.50 per wk. \$ 6.00 per mo. utilities	\$7.50 per wk.	\$215.00 60.00
2968	Charles L. Logan—Jan. 1, 1947, to Mar. 16, 1947.....		\$12.00 per wk. \$ 6.00 per mo. utilities	\$7.50 per wk.	\$ 45.00 12.00
2970	Bernard Appel—May 13, 1946, to Oct. 1, 1946.....		\$16.00 per wk.	\$27.50 per mo.	\$131.00
2970	J. R. Griffin—Aug. 20, 1946.....			Bonus	\$ 50.00
2970	J. R. Griffin—Aug. 20, 1946, to Oct. 2, 1946.....		\$ 9.00 per wk.	\$27.50 per mo.	\$ 23.00
2970	Albert J. Wunsly—Feb. 23, 1947, to date.....		\$30.00 per wk.	\$27.50 per mo.	\$645.00
	Billie J. Wunsly.....				
	John Doe 1.....				
	John Doe 2.....				
	Jane Roe.....				
	Richard Roe.....				
2972	Bernice Market—Feb. 23, 1947, to date.....		\$36.00 per wk.	\$27.50 per mo.	\$807.00
	Avonne Market.....				
	Inez Olander.....				
	Shirley Johnson.....				
	Jane Doe 1.....				
	Jane Doe 2.....				

Points of Law

The decisions of the Rent Director are not open to question in this action.

Yakus v. U. S. (1943)

321 U.S. 414, 427, 431;

88 L. Ed. 834, 850, 852.

Bowles v. Willingham (1943)

321 U. S. 503, 528;

88 L. Ed. 892, 910.

The filing of a protest or petition for a review of the decision of the Rent Director shall not be grounds for staying any proceedings brought under Section 205 of the Emergency Price Control Act. The stay for which the statute provides is authorized only after judgment and upon application made within five days after judgment.

Emergency Price Control Act of 1942, as Amended, 50 U.S.C.A. App. 924(e)(2).

Dated: September 3, 1947.

ABE I. LEVY,

STEPHEN D. MONAHAN,

FRANK L. HIRST,

By /s/ CASSEL JACOBS,

Attorneys for Plaintiff.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Sept. 3, 1947. [11]

At a stated term, to wit: The September Term, A.D. 1947, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Tuesday, the 9th day of September, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Peirson M. Hall,
District Judge.

[Title of Cause.]

For trial; Stephen Monahan, Esq., present for plaintiff; H. T. Kellogg, Esq., present for defendant;

Attorney Monahan moves for substitution of party-plaintiff, substituting Frank R. Creedon, Housing Expediter, in place of and instead of Philip B. Fleming, which motion is ordered denied.

On motion of Attorney Kellogg, on grounds there is no party plaintiff, Court orders the case dismissed. [13]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUBSTITUTION
OF PARTY PLAINTIFF

To: Pearl Rose, defendant, and Hiram T. Kellogg,
her attorney:

Please Take Notice that on December 15, 1947,
at 10:00 a.m., or as soon thereafter as counsel can

be heard, the undersigned will appear before His Honor, Judge Peirson M. Hall, in the Courtroom usually occupied by him, in the United States Post Office and Courthouse Building, 312 North Spring Street, Los Angeles, California, and then and there move the Court for an Order in conformity with the petition hereto attached.

Dated this 1st day of December, 1947.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
SHERMAN GRANCELL,

By /s/ STEPHEN D. MONAHAN,

Attorneys for Tighe E. Woods,
Acting Housing Expediter.

[Endorsed]: Filed Dec. 3, 1947. [14]

[Title of District Court and Cause.]

MOTION FOR SUBSTITUTION OF
PARTY PLAINTIFF

The petition of Tighe E. Woods respectfully shows:

1. Petitioner is the duly appointed, qualified and acting Acting Housing Expediter.
2. By virtue of Executive Order (12 F. R. 7265) issued by the President of the United States November 1, 1947, petition has been invested with all of the functions with respect to rent control heretofore exercised by Frank R. Creedon, Housing Expediter, and his prede-

cessors in office, with full power and authority to continue and maintain in his own name all civil proceedings heretofore instituted, maintained or defended by the said Housing Expediter.

3. There is substantial need for continuing and maintaining this action.

Wherefore, petitioner prays that as Acting Housing Expediter, Office of the Housing Expediter, he be substituted as plaintiff herein in the place and stead of Philip B. Fleming, Administrator, Office of Temporary Controls, Office of Price Administration.

Dated this 1st day of December, 1947.

TIGHE E. WOODS,

Acting Housing Expediter.

By ABE I. LEVY,

STEPHEN D. MONAHAN,

FRANK L. HIRST,

SHERMAN GRANCELL,

By /s/ STEPHEN D. MONAHAN,

Attorneys for Tighe E. Woods,

Acting Housing Expediter.

Points and Authorities

On Nov. 19, 1947, in *Gates vs. Creedon*, 5635 Circuit Court of Appeals for the 4th Circuit overruled the objection of appellant to the substitution of Tighe E. Woods, Acting Housing Expediter, as appellee, for Frank R. Creedon. In *Porter vs. Koike*, No. 11575 9th Circuit Court of Appeals, decided

Oct. 31, 1947 (but not yet reported), in a case involving price violation the Court held that the United States may be substituted for Porter since the latter was no more than nominal plaintiff.

[Affidavit of service by mail attached.] [16]

[Title of District Court and Cause.]

MOTION FOR ENTRY OF JUDGMENT

To: Pearl Rose, defendant, and Hiram T. Kellogg,
her attorney:

Please Take Notice that on the 15th day of December, 1947, at 10:00 a.m., or as soon thereafter as counsel can be heard, I shall appear before His Honor, Judge Peirson M. Hall, in the Courtroom usually occupied by him in the United States Post Office and Courthouse Building, 312 North Spring Street, Los Angeles, California, and move the Court to direct the entry of a judgment in the above-entitled cause.

Dated this 1st day of December, 1947.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
SHERMAN GRANCELL,

By /s/ STEPHEN D. MONAHAN,

Attorneys for Plaintiff. [18]

Points and Authorities

On September 9, 1947, when the above-entitled cause was called for trial the Court granted the defendant's motion to dismiss plaintiff's complaint. Thereafter a proposed judgment was prepared by defendant's attorney and served on plaintiff's attorney, and plaintiff's attorney filed his objections to said proposed judgment, together with an alternative form of judgment: It appears from the records that neither form of judgment has been entered, and plaintiff is unable to proceed with the proper disposition of the case.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Dec. 2, 1947. [19]

[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED JUDGMENT

Comes now Stephen D. Monahan, attorney for Philip B. Fleming, Administrator, plaintiff herein, and for Frank R. Creedon, Housing Expediter, and objects to the judgment as prepared by attorney for defendant for the following reasons:

1. That the real party in interest is the United States of America and it is not material in whose name it is maintained.

2. That there was no adjudication on the merits at the time the case was called for trial and

that therefore any judgment of dismissal should be without prejudice.

Fleming v. Mohawk Wrecking & Lumber Co.,
331 U.S. 111.

Porter v. Maule.

CCA 5, 160 F. 2d 1.

Dated: Los Angeles, California, this 24th day of
October, 1947.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,

By /s/ STEPHEN D. MONAHAN.

Attorney for Philip B. Fleming, OPA Administrator,
and Frank R. Creedon, Housing Expediter. [21]

[Affidavit of service by mail attached.]

[Endorsed]: Filed Feb. 10, 1948. [22]

In the District Court of the United States, Southern
District of California, Central Division

No. 6827-PH

PHILIP B. FLEMING, Administrator, Office of
Temporary Controls, Office of Price Adminis-
tration,

Plaintiff,

vs.

PEARL ROSE, DOE I and DOE II,
Defendants.

JUDGMENT OF DISMISSAL

The above-entitled matter having come on for trial on Tuesday, September 9th, 1947, pursuant to a setting theretofore made regularly by the above-entitled court, and the plaintiff and the defendant appearing by their attorneys, Stephen D. Monahan, Esq., appearing for Philip B. Fleming, Administrator, Office of Temporary Controls, Office of Price Administration, and Hiram T. Kellogg, Esq., appearing in behalf of Pearl Rose, and the attorney for plaintiff having advised the court that the plaintiff was ready for trial and the court having thereupon called to the attention of the said attorneys to the fact that Philip B. Fleming was no longer Administrator of the Office of Temporary Controls, Office of Price Administration, and motion having been made then orally by Stephen D. Monahan to substitute Frank Creedon, Housing Expediter, as plaintiff in the place and stead of Philip B. Fleming, and [23]

It appearing to the court from the files and records in the above-entitled action that no Notice of Motion for substitution of parties plaintiff had ever been served upon the defendant, and

It appearing that Philip B. Fleming had not been Administrator of the Office of Temporary Controls, Office of Price Administration for more than five months prior to the date of trial, and

It appearing that the plaintiff had not complied with the rules of court with reference to the Notice and the preparation of Motion required, said Motion being objected to by the defendant by and through her attorney, Hiram T. Kellogg, the motion of the plaintiff was thereupon denied.

A motion being thereupon addressed to the court by the defendant moving the dismissal of the action upon the ground that the plaintiff Philip P. Fleming was no longer the real party in interest; that he was no longer Administrator of the Office of Temporary Controls, Office of Price Administration, and that he no longer had power and authority to maintain said action, the motion of dismissal of said defendant was thereupon granted.

That pursuant to the granting of said motion a motion for judgment of dismissal made by said defendant in open court on September 9, 1947.

It Is Ordered and Adjudged that the defendant is entitled to a judgment of dismissal in the above-entitled action.

Let Judgment be entered accordingly.

/s/ PEIRSON M. HALL,

Judge.

Dated: Feb. 10, 1948.

Approved as to form.

Received a copy of the above and foregoing Judgment Oct. 20th, 1947.

/s/ STEPHEN D. MONAHAN,
Attorney for Plaintiff. [24]

[Title of District Court and Cause.]

ORDER SUBSTITUTING PARTY
PLAINTIFF

On motion of Stephen D. Monahan, attorney for plaintiff, it is Ordered that Tighe E. Woods, as Housing Expediter, Office of the Housing Expediter, be and he is hereby substituted as party plaintiff in the place and stead of Philip B. Fleming, Administrator, Office of Temporary Controls, Office of Price Administration.

Dated this 16th day of March, 1948.

/s/ PEIRSON M. HALL,
Judge.

[Endorsed]: Filed March 17, 1948. [25]

In the District Court of the United States, Southern
District of California, Central Division

No. 6827-PH

TIGHE E. WOODS, Housing Expediter, Office
of the Housing Expediter,

Plaintiff,

vs.

PEARL ROSE, DOE I and DOE II,

Defendants.

NOTICE OF APPEAL

Notice Is Hereby Given that Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the entire final judgment entered in this action on the 10th day of February, 1948.

Dated this 1st day of April, 1948.

ABE I. LEVY,

STEPHEN D. MONAHAN,

By /s/ STEPHEN D. MONAHAN,

Attorneys for Plaintiff.

[Affidavit of service by mail attached.]

[Endorsed]: Filed April 5, 1948. [26]

[Title of District Court and Cause.]

STATEMENT OF POINTS

The following are the points upon which appellant intends to rely upon the appeal:

1. The Court erred in dismissing the above-entitled action.

2. The Court erred in denying appellant's oral motion to substitute Frank R. Creedon, Housing Expediter, Office of the Housing Expediter, as plaintiff in the place and stead of Philip B. Fleming, Administrator, Office of Temporary Controls, Office of Price Administration.

/s/ ABE I. LEVY,

/s/ STEPHEN D. MONAHAN,

Office of the Housing Expediter, 1206 Santee Street,
Los Angeles 15, California, Attorneys for Appellant. [28]

Service of the foregoing statement of points is acknowledged this 28th day of April, 1948.

/s/ HIRAM T. KELLOGG,

Attorney for Defendant-
Appellee.

[Endorsed]: Filed April 28, 1948. [29]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF RECORD
ON APPEAL

Appellant, Tighe E. Woods, as Housing Expediter, Office of the Housing Expediter, hereby designates the following portions of the Record to be included in the Record on Appeal:

1. The Complaint, filed April 18, 1947.
2. The Answer of the defendant Pearl Rose, filed May 12, 1947.
3. Trial statement—Memorandum of facts and summary of points of law, filed September 3, 1947.
4. Order denying oral motion of plaintiff to substitute Frank R. Creedon, Housing Expediter, for Philip B. Fleming, Administrator Office of Temporary Controls, Office of Price Administration, as party plaintiff, entered September 9, 1947, in open court.
5. Order for judgment of dismissal of action entered September 9, 1947, [30] in open court.
6. Notice of motion and motion of plaintiff to substitute Tighe E. Woods, Acting Housing Expediter, Office of the Housing Expediter, for Philip B. Fleming, Administrator, Office of Temporary Controls, as party plaintiff, filed December 2, 1947, together with proof of service.
7. Notice of motion and motion to direct the entry of a judgment, filed December 2, 1947.

8. Objections to defendant's proposed judgment of dismissal, filed February 10, 1948.
9. Judgment of dismissal of action, filed February 10, 1948.
10. Order substituting Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, as party plaintiff, filed March 17, 1948.
11. Notice of appeal, filed April 5, 1948.
12. Statement of points upon which appellant intends to rely on appeal.
13. This designation.

Dated April 28, 1948.

/s/ ABE I. LEVY,

/s/ STEPHEN D. MONAHAN,

Office of the Housing Expediter, 1206 Santee Street,
Los Angeles 15, California, Attorneys for
Appellant.

Service of the foregoing appellant's designation of record on appeal is acknowledged this 28th day of April, 1948.

/s/ HIRAM T. KELLOGG,

Attorney for Defendant-
Appellee.

[Endorsed]: Filed April 28, 1948. [31]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 31, inclusive, contain full, true and correct copies of Complaint for Treble Damages and Injunction; Answer to Complaint for Treble Damages and Injunction; Memorandum of Facts and Summary of Points of Law; Minute Order Entered September 9, 1947; Notice of and Motion for Substitution of Party Plaintiff; Motion for Entry of Judgment; Objections to Proposed Judgment; Judgment of Dismissal; Order Substituting Party Plaintiff; Notice of Appeal; Statement of Points on Appeal and Designation of Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 10th day of May, A.D. 1948.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy Clerk.

[Endorsed]: No. 11928. United States Circuit Court of Appeals for the Ninth Circuit. Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, Appellant, vs. Pearl Rose, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed May 11, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 11928

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

**FIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLANT**

vs.

PEARL ROSE, APPELLEE

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION**

APPELLANT'S BRIEF

ED DUPREE,

General Counsel,

HUGO V. PRUCHA,

Assistant General Counsel,

NATHAN SIEGEL,

Special Litigation Attorney,

*Office of the Housing Expediter, Office of the General Counsel,
4th and Adams Drive SW., Washington 25, D. C.*

FILED

JUL 31 1948

PAUL R. O'BRIEN

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11928

**TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLANT**

vs.

PEARL ROSE, APPELLEE

***APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION***

APPELLANT'S BRIEF

STATEMENT OF JURISDICTION

The Housing Expediter appeals from a final judgment of the United States District Court for the Southern District of California, Central Division, entered on February 10, 1948, dismissing an action brought pursuant to Sections 205 (a) and (e) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. App., Sec. 925 (a) and (e)), for violations of the Rent Regulation for Housing (10 F. R. 3436). Notice of appeal was filed on April 1, 1948 (R. 21). Jurisdiction of the District Court was invoked under Sections 205 (a), (c), and (e) of said Act, and jurisdiction of this Court is invoked under Section 128 of the Judicial Code (28 U. S. C. A., Sec. 225).

STATEMENT OF THE CASE

This appeal raises the question of whether the Court below erred in denying a motion for substitution of the party plaintiff in an action brought under Sections 205 (a) and (e) of the Emergency Price Control Act of 1942, and in dismissing the action because a motion for substitution was not made in strict accordance with local rules, and because the original party plaintiff had resigned prior to trial.

This action was instituted on April 18, 1947, by Philip B. Fleming, Administrator, Office of Temporary Controls-Office of Price Administration, in the District Court of the United States for the Southern District of California, Central Division (R. 2-8). It was brought pursuant to Sections 205 (a) and (e) of the Emergency Price Control Act of 1942, as amended, for restitution and statutory damages because of defendant's alleged violations of the Rent Regulation. On May 12, 1947, the defendant answered denying generally charges of violation (R. 8-10).

On January 17, 1947, Frank R. Creedon was the duly appointed, qualified, and acting Housing Expediter, having been confirmed in that position by the Senate on that date (Cong. Rec. Vol. 93, No. 12, p. 455, January 17, 1947). On April 23, 1947, by virtue of Executive Order 9841 (12 F. R. 2645) issued by the President of the United States, Frank R. Creedon was invested with all of the functions with respect to rent control theretofore vested in the Temporary Controls Administrator, Office of Temporary Controls, with full power to continue and maintain in his name all civil

proceedings theretofore instituted, maintained, or defended by the Temporary Controls Administrator.

On June 30, 1947, the Emergency Price Control Act of 1942 expired by its terms. Section 1 (b) of said Act (the savings clause) provided that the provisions of the Act and the applicable regulations shall be treated as still remaining in force for the purpose of sustaining any suit respecting any liability which arose prior to the termination of the Act. On July 1, 1947, the Housing and Rent Act of 1947 went into effect. Under this Act, authority to administer the powers, functions, and duties thereunder was conferred by Congress on the Housing Expediter, to whom rent control was transferred, and who "was retained as the official to administer the [rent control] law" (Sen. Conf. Rep., Cong. Rec., June 19, 1947, p. 7439; Sen. Rep. No. 86, 80th Cong., 1st Sess., p. 2).

On September 9, 1947, after the new Act went into effect and the functions previously exercised by Philip B. Fleming as to cases arising under the Act of 1942 had been transferred to Frank R. Creedon, the new Housing Expediter, a motion was made to substitute Creedon as party plaintiff in the place and stead of Philip B. Fleming in the instant suit. This motion was denied (R. 12). Simultaneously on the motion of the attorney for the defendant, the Court ordered the case dismissed on the ground that there was "no party plaintiff" (R. 12, 18). The reason assigned by the Court below for denying the motion of the plaintiff to substitute Creedon for Fleming was that plaintiff had not complied with the rules of

Court with reference to the notice and the preparation of motion required (R. 19). For reasons which are not apparent in the record, no judgment was entered on this disposition below until February 10, 1948. Prior thereto, however, on November 1, 1947, by virtue of Executive Order (12 F. R. 7265) issued by the President of the United States, Tighe E. Woods was appointed Acting Housing Expediter, and invested with all of the functions with respect to rent control theretofore exercised by Frank R. Creedon, his predecessor, with full power to continue all civil proceedings theretofore maintained by Frank R. Creedon. Accordingly, on December 1, 1947, a motion was made returnable December 15, 1947, to substitute Tighe E. Woods, Acting Housing Expediter, as plaintiff in the place of Philip B. Fleming, the original plaintiff. At the same time, the plaintiff made a motion returnable also on December 15, 1947, for an entry of judgment based upon the Court's previous ruling denying substitution and dismissing the complaint on September 9, 1947. In support of the motion for entry of judgment, the plaintiff called to the District Court's attention, the fact that no judgment had as yet been entered to reflect this previous disposition (R. 16).

Finally, on February 10, 1948, a judgment of dismissal was entered (R. 18, 20). The grounds assigned by the Court below in support of the judgment of dismissal were recited in the judgment as follows:

1. That it appeared to the Court that no notice of motion for substitution of parties plaintiff had ever been served upon the defendant.

2. That Philip B. Fleming had not been Administrator of the Office of Temporary Controls for more than five months prior to the trial.

3. That the plaintiff had not complied with the rules of Court with reference to the notice and the preparation of notice required; and

4. That Philip B. Fleming was no longer the real party in interest; that he was no longer Administrator of the Office of Temporary Controls-Office of Price Administration; and that he no longer had power and authority to maintain said action (R. 19).

No reference was made in the recitals of this judgment to the motion by plaintiff on December 1, 1947, to substitute Tighe E. Woods, Acting Housing Expediter, as plaintiff in place of Philip B. Fleming. From this judgment, Notice of Appeal was filed by the Housing Expediter on April 1, 1948 (R. 21).

SPECIFICATIONS OF ERROR

1. The Court below erred in dismissing the above-entitled action for want of jurisdiction.

2. The Court below erred in dismissing this action on the ground that the plaintiff had not complied with the rules of Court with reference to the notice and preparation of motion for substitution of parties.

3. The Court below erred in dismissing this action on the ground that the original plaintiff had not been in office for more than five months prior to the date of trial.

4. The Court below erred in dismissing this action on the ground that the original plaintiff, Philip B. Fleming, was no longer the real party in interest; that

he was not Administrator of the Office of Temporary Controls; and that he no longer had power and authority to maintain said action.

ARGUMENT

I

Since the United States was always the real party in interest in this suit, it was immaterial who the nominal plaintiff was. Hence, the Court erred in dismissing the action either on the ground that notice of motion to substitute one nominal plaintiff for another was improperly made, or because the original nominal plaintiff was no longer in office, or for any other ground assigned by it in this case

Since the Court below wrote no opinion, the grounds for dismissal of this action must be pieced together from the recitals in its judgment. These were: (1) that no notice of motion for substitution of parties plaintiff had ever been served upon the defendant; (2) that Philip B. Fleming had not been Administrator of the Office of Temporary Controls for more than five months prior to trial; (3) that plaintiff had not complied with the rules of Court with reference to notice and preparation of notice, and (4) that Philip B. Fleming was no longer the real party in interest; that he was no longer Administrator of the Office of Temporary Controls-Office of Price Administration, and that he no longer had power and authority to maintain said action.

None of these grounds for dismissal of the instant action can be sustained because each is based on the theory that the real party in interest was Philip B. Fleming, Administrator, Office of Temporary Controls,

the plaintiff in whose name the action was brought. This was clearly erroneous since the real party in interest was not Philip B. Fleming, or any other individual Administrator, but the United States Government. Examination of the statutory character of the suit and of the cases construing similar actions, shows beyond a question of a doubt that the Administrator's appearance in the action brought under Section 205 (e) was a function of the Office of Temporary Controls and, as such, was effected solely in a representative capacity on behalf of the United States, the real plaintiff. Since the United States was always the real party in interest, it was immaterial who the nominal plaintiff was. For that reason, the action should not have been dismissed either because notice of motion to substitute one nominal plaintiff for another was improperly made, or because the original nominal plaintiff was no longer in office. As we shall show, the ruling below is contrary to this Court's decisions in *United States v. Koike*, 164 F. 2d 155, and *Fleming v. Findlay and Lenske*, 165 F. 2d 79, as well as a decision of the Eighth Circuit Court of Appeals in *Fleming v. Goodwin*, 165 F. 2d 334, certiorari denied, May 24, 1948, and many decisions of other courts.

a. Consideration of the act

Section 205 (e) of the Emergency Price Control Act specifically provides that “* * * The Administrator may institute such action on behalf of the United States * * *.” Such a provision is tantamount to an investiture in the United States itself. See, *United*

States v. Summerlin, 310 U. S. 414, 416, and cases there cited, where the Supreme Court said:

The claim assigned to the Federal Housing Administrator acting in behalf of the United States became the claim of the United States and the United States thereupon became entitled to enforce it.

Moreover, the proceeds of any recovery by the Administrator in treble damage cases are, of course, payable solely to the Treasurer of the United States (see, 31 U. S. C. 147; cf. 18 U. S. C. 174, Criminal Code, Sec. 88), and costs cannot "be assessed against the Administrator or the United States" (Sec. 205 (c) of the Act, 50 U. S. C. App. Supp. V, 925 (c)).

While treble damage actions were instituted, as permitted by the statute, in the name of the particular Price Administrator then in office, that procedure patently was adopted merely for judicial and administrative convenience, so that all parties could easily determine the special nature of the action, and could distinguish such actions from the vast bulk of federal litigation normally carried in the name of the United States as such (see, *Fleming v. Goodwin*, 165 F. 2d 334, 338 (C. C. A. 8)). However, even though the Administrator exercised the authority to institute action nominally in his name, no distinction can be drawn in respect of such actions between the officer and the office (*Federal Housing Administrator v. Burr*, 309 U. S. 242, 249-250). In the *Burr* case, the question was whether the Federal Housing Administration could be sued for garnishment where the statute in question provided that the Administrator, rather than

the agency, could sue or be sued. In holding that the Federal Housing Administration, the office, was subject to garnishment, the Supreme Court stated:

There is some point made of the fact that suit was brought against the Federal Housing Administration rather than against the Administrator. But when the statute authorizes suits by or against the Administrator "in his official capacity" we conclude that that permits actions by or against the Federal Housing Administration. The Administrator acts for and on behalf of the Federal Housing Administration, since by express terms of the Act all of the powers of the latter "shall be exercised" by him. Hence action by him in the name of the Federal Housing Administration would be action in his official capacity.

The same view has been expressed with respect to actions under the Emergency Price Control Act. Thus, in *Shaw v. United States*, 151 F. 2d 967, 970, the Sixth Circuit stated:

The Price Administrator is not to be distinguished from the Office of Price Administration any more than the Federal Housing Administrator, acting in his official capacity, is to be distinguished from the Federal Housing Administration. *Federal Housing Administration v. Burr*, 309 U. S. 242, 249, 250, 60 S. Ct. 488, 84 L. Ed. 724.

It is inconceivable that the institution or maintenance of an action under the Act can be considered a personal or individual function of the Administrator. To accept that view would mean that unless a successor personally directed that his name be sub-

stituted, an action would be allowed to abate. For example, during the year 1946, when there were two changes of Administrators,¹ there were over 28,458 cases (mostly treble damage actions) in the federal courts alone in which the Office of Price Administration was a party plaintiff.² Obviously, a personal decision of the Administrator with respect to each case would be impossible. Such litigation was essentially by the office as such, and not actions personal in character in any respect.

From the foregoing, it must be obvious that even though instituted in the name of the particular Administrator then in office, treble damage actions were instituted as a function, and a continuing function, of that office as an agency of the United States. That being so, compliance with Rule 25 (d) of the Federal Rules of Civil Procedure or the Abatement Act in 28 U. S. C. Section 780, *infra*, p. 26, providing for the substitution of successor Government officers, was not even required for the continued maintenance of a case such as this. Rule 25 (d), as well as its predecessor, 28 U. S. C. Section 780, was intended only to require substitution of parties where the action was personal in character, brought by or against a public officer, involving his personal performance. At common law, such an action abated, whereas actions for or against the office or governmental body did

¹ Chester Bowles was succeeded by Paul Porter on February 26, 1946, and the latter succeeded by Philip B. Fleming on December 12, 1946. •

² Annual Report of the Director of the Administrative Office of the United States Courts (1946), p. 56.

not abate (*Thompson v. United States*, 103 U. S. 480, 483-485; *United States ex rel Bernardin v. Butterworth*, 169 U. S. 600; *Weadon v. Shahan*, 50 Cal. App. 2d 254, 123 P. 2d 88). The so-called abatement statutes and Rule 25 derived therefrom, were intended to remedy the common law rule in order to allow survival and substitution in the personal suits. They have no application to suits pertaining to the office, such as here, which would not have abated at common law (cf. *Ex parte LaPrade*, 289 U. S. 444, 456-459; see official notes of draftsmen to Rule 25 (d) of Federal Rules of Civil Procedure). These principles are cogently summed up in *Fleming v. Goodwin*, 165 F. 2d 334 at p. 337, as follows:

The purpose of the Rule [25 (d)], like that of the statute which it superseded, was to provide for the continuance of an action, personal in character, brought by or against a public officer, where a substantial need for continuing the action existed and the action could not, without statutory authority, be maintained against his successor after the officer had ceased to hold office. The statute therefore was intended to cover only such actions, to which a public officer was a party, as would abate upon his separation from office. The need for the statute did not arise out of the death or resignation of Government officers who had brought actions on behalf of the Government. Such a statute was needed because the Supreme Court had ruled, in a number of cases, that actions brought against public officers to compel personal performance of their official duties could not be continued

as against their successors, even though the successors consented (citing cases).

b. Consideration of authorities

Decisions by this Court and two other Circuit Courts of Appeals which have had occasion to deal with the problem, are in accord that the United States is the real party in interest in an action brought under Section 205 (e), and that the Administrator in whose name the action was brought is solely a nominal party (*United States v. Koike*, 164 F. 2d 155 (C. C. A. 9th); *Fleming v. Findlay and Lenske*, 165 F. 2d 79 (C. C. A. 9th); *Fleming v. Goodwin*, 165 F. 2d 334 (C. C. A. 8th), certiorari denied, May 24, 1948; *Porter v. Maule*, 160 F. 2d 1 (C. C. A. 5th); see, too, *Porter v. American Distilling Company*, 71 F. Supp. 483 (S. D. N. Y.); *Fleming v. Peoples Natural Gas Company*, 8 F. R. D. 42 (W. D. Pa.)).

In *United States v. Koike*, *supra*, this Court, speaking through Judge Denman, pointed out that although the action for statutory damages is brought in the name of the Administrator, it is actually a suit by the United States, as the real party in interest. Hence, when one Administrator is substituted for another in the suit, it "is not technically a matter of making a new party at all." In substance and reality, the action continued to be a controversy between the Government and the defendant. This Court summed up the rule as follows (164 F. 2d at p. 157):

In the view we take, the substitution of the United States is not technically a matter of

making a new party at all. The action here was commenced by Porter under Sec. 205 (e) of the Act, which provides that "The Administrator may institute such action on behalf of the United States." Porter was, therefore, no more than a nominal plaintiff; and Fleming, who should have been substituted as Porter's successor, would have been in no different position. The United States, on behalf of which the action was brought, was the real plaintiff. *Bowles v. Goldman*, D. C., 7 F. R. D. 12, 17. Whether the action is maintained by an official authorized to sue on its behalf, or by the United States in its own name, the real plaintiff remains the same.

This Court's decision was followed by the Eighth Circuit Court of Appeals in *Fleming v. Goodwin*, *supra*. In that case, the facts were these: The action was brought on September 6, 1945, by Chester Bowles, Price Administrator, Office of Price Administration, under Section 205 (e) of the Emergency Price Control Act for alleged violations of one of the regulations issued under that Act. Bowles resigned as Price Administrator effective February 25, 1946, and Paul A. Porter became his successor on the following day. On August 23, 1946, Porter filed a motion in the District Court to be substituted for Bowles as plaintiff. This motion was noticed for hearing on August 28, 1946, which was more than six months after Porter had taken office. On November 1, 1946, the District Court entered an order denying Porter's motion and sustaining a motion of the defendants for the abatement and dismissal of the action. Porter ceased to hold the office of Price Administrator on December 12, 1946,

and was succeeded by Philip B. Fleming, Temporary Controls Administrator, under Executive Order 9809 (50 U. S. C. A. App., Sec. 601 note, 11 F. R. 14281). The latter, on January 20, 1947, moved that he be substituted for Porter as plaintiff. The District Court heard Fleming's motion for substitution on January 24, 1947, but reserved its ruling. Fleming, on January 29, 1947, appealed to the Court from the order of November 1, 1946, denying Porter's motion for substitution, and dismissing the action.

On June 18, 1947, the United States Attorney for the Western District of Missouri filed in the Court, a motion to substitute the United States as appellant on the ground that by Executive Order 9842 (50 U. S. C. A. App., Sec. 925 note, 12 F. R. 2646), the Attorney General had been vested with authority to maintain this action in the name of the United States. This motion and objections thereto, together with a motion of appellees to dismiss the appeal, were passed for consideration by the Court at the submission of the appeal on the merits.

The Government contended on appeal that the United States was at all times the real party in interest; that Bowles and those who succeeded to the powers and authority of the office of Price Administrator were nominal parties, and that compliance with Rule 25 (d) of the Federal Rules of Civil Procedure (*infra*, p. 31) was not a condition precedent to the continued maintenance of the action. Sustaining the Government's contention, the Circuit Court, speaking through Judge Sanborn, said the following (165 F. 2d at p. 338):

We think that Rule 25 (d) is no broader than the reason for it, and that this action may still be maintained, notwithstanding the failure of Bowles' successors to comply with the Rule. The Price Administrator was authorized by Sec. 205 (e) of the Emergency Price Control Act to bring the action "on behalf of the United States." He was not authorized to bring it on his own behalf. The right and duty to institute and maintain the action attached to the office and not to the individual who happened to be holding the office at the time the action was brought. We think that the action survived the resignation of Bowles as Price Administrator and was unaffected by that event. The duty and authority to continue this action on behalf of the Government devolved upon Porter as the successor to Bowles, and then upon Fleming as successor to Porter, and finally upon the Attorney General, who was authorized to maintain it in the name of the United States. The action was, however, in substance and reality, at all times a controversy between the Government and the appellees. The only purpose of substitution in such a case is to keep the record straight so that the judgment finally entered will unquestionably bind the right parties. Such a substitution, we think, amounts to nothing more than a formal amendment to the title of the action to conform it to the truth.

In *Porter v. Maule*, *supra*, the defendants moved to dismiss an appeal of the Administrator, Paul A. Porter, because at the time the notice of appeal was given in the name of Bowles, Porter, not Bowles, was the Administrator, and Porter not having given

notice, there was no proper appeal. The defendants also contended that the orders of the District Judge substituting Porter as plaintiff, and the order of a Judge of the Circuit Court substituting Porter as appellant, were ineffective because granted too late, and because the order of the District Judge was made after the purported appeal and after the District Court had lost jurisdiction. The defendants also claimed that the order of the District Court substituting Porter for Bowles was without force because the law creating the Office of Price Administration had ceased to be effective on June 30, 1946, the office had expired, and it had not been restored or recreated. The Circuit Court of Appeals for the Fifth Circuit rejected these contentions and, speaking through Judge Hutcheson, said the following (160 F. 2d at p. 3):

As to the substitution of parties, we are in no doubt that in a case of this kind, while suits are brought and proceed in the name of the administrator, he is plaintiff in name only. As administrator, he acts not for himself but for the office. Action that he takes in filing suits, and in appealing from judgments in them, is action on behalf, and for the use, of the office, and when he is no longer administrator, of his successor. * * * We think it plain, though, on reason and on authority, [citing cases] that the suit did not abate but continued both for judgment and for appeal in the name of the nominal plaintiff until his successor was substituted.

More recently, this Court in *Fleming v. Findlay and Lenske, supra*, reversed a ruling of the District

Court of the District of Oregon which dismissed an action brought by Fleming, and which refused for jurisdictional reasons to allow substitution of Philip B. Fleming, as plaintiff, in place of Paul A. Porter, Administrator, who had instituted the action. In reaching its conclusion, reliance was placed by this Court upon its previous ruling in *United States v. Koike, supra*.

c. Since the United States was the real party in interest, the action could have been continued without substitution of Creedon for Fleming. Therefore, failure to comply with the rules with reference to notice of motion for substitution by the Court below was not a valid basis for dismissal of the suit

From these authorities, it must be manifest that since the United States was the real party in interest at all times, the action could have continued without substitution of Creedon for Fleming. It is, therefore, equally clear that the alleged failure on the part of plaintiff to comply with the rules of the Court with reference to notice of motion for substitution was not an adequate ground upon which to rest the judgment of dismissal in this case. As was said in *Fleming v. Goodwin*, 165 F. 2d at p. 338:

To hold that this action abated upon the resignation of Chester Bowles as Price Administrator and was no longer maintainable because of the noncompliance by his successors with Rule 25 (d), would, in our opinion, be to glorify form over substance and reality. Compare, *Thompson v. United States*, 103 U. S. 480, 484, 26 L. Ed. 521; *Porter v. Maule*, 5 Cir., 160 F. 2d 1, 3; *United States v. Koike*, 9 Cir., 164 F. 2d 155, 157.

Apart from that, it has been held that motions by Government officers for substitution under Rule 25 (d) may be heard *ex parte* (*Bowles v. Weiner*, 6 F. R. D. 540 (E. D. Mich.); *Bowles v. Goldman*, 7 F. R. D. 12 (W. D. Pa.); *Porter v. Woodruff*, 7 F. R. D. 391 (W. D. N. Y.); *In re Creedon*, 7 F. R. D. 546 (W. D. N. Y.); *Bowles v. Blue Ribbon Provisions*, 7 F. R. D. 603 (E. D. N. Y.); *Bowles v. Kent County Motor Company*, 6 F. R. D. 515, 516 (D. C. Del.)). These cases reach this result on the basis of the express language of Rule 25 (d) of the Federal Rules of Civil Procedure, which requires notice only "to the party or officer to be affected." In *Bowles v. Weiner*, *supra*, the Court said on this point (6 F. R. D. at p. 542):

It is therefore the successor-officer who is the party affected and to whom notice is required to be given, and not the opposite party.
 * * * the defendants are in no manner affected by the substitution of parties plaintiff in this case, and * * * they have not been in any manner prejudiced thereby.

It should also be noted in this connection that in *Fleming v. Goodwin*, *supra*, the District Court held that because of Rule 6 (d) of the Federal Rules of Civil Procedure, "no action could be taken nor showing made until five days after the filing of said motion" (68 F. Supp. 949). In that case, the motion for substitution was filed on August 23, 1946, within six months after Porter took office on February 26, 1946. If strict compliance with Rule 6 (d) was nec-

essary, the motion for substitution was three days late under Rule 25 (d), since Rule 6 (d) provides:

A written motion, other than one which may be heard *ex parte*, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing,
* * *

As we have shown above, the Circuit Court of Appeals for the Eighth Circuit ruled that "to hold that this action * * * abated * * * because of the non-compliance * * * with Rule 25 (d) would * * * be to glorify form over substance and reality" (165 F. 2d at p. 338).

d. The fact that the original plaintiff had not been in office for more than five months prior to date of trial; that he was no longer the real party in interest, and that he no longer had power and authority to maintain this action, were likewise no proper reasons for dismissing this suit

The other grounds assigned by the Court below for dismissing the suit were that the plaintiff had not been in office for five months prior to trial; that he was no longer the real party in interest, and that he no longer had power to maintain the suit (R. 19).

The short answer to these contentions is that similar contentions were raised in both *Fleming v. Findlay and Lenske, supra*, and *United States v. Koike, supra*, and in both instances, this Court held them to be untenable. See also, *Fleming v. Mohawk Wrecking and Lumber Company*, 331 U. S. 111, 119; *Porter v. American National Bank and Trust Company*, 161 F. 2d 504 (C. C. A. 7th).

e. Even if substitution was necessary in this case, since defendant showed no prejudice, it should have been granted in furtherance of justice

In the instant case, the motion for substitution of Frank R. Creedon for Philip B. Fleming was made upon trial. Moreover, prior to entry of judgment of dismissal on February 10, 1948, a motion had been made upon more than ten days' notice to substitute Tighe E. Woods, Acting Housing Expediter, in place of Philip B. Fleming (R. 13-14), but the Court below did not act on this motion. As shown above, we do not think substitution was necessary here since it was unaffected by the resignation of Fleming (*Fleming v. Goodwin*, *supra*, at p. 338). But if it was, then consonant with the liberal principles prevailing under Rule 15 of the Federal Rules of Civil Procedure, following 28 U. S. C. Section 723 (c), substitution should have been granted either upon trial or thereafter, unless prejudice could be shown by defendant. As this Court said in *United States v. Koike*, *supra* (164 F. 2d at p. 157):

If the substitution of the United States is permitted here, the defendant will in no way be prejudiced. The cause of action against him remains the same, and judgment will bar further suits. *Sunshine Coal Co. v. Adkins*, 310 U. S. 381, 402, 60 S. Ct. 907, 84 L. Ed. 123. If substitution is not permitted, however, the result would be to require the United States to proceed in the name of an authorized representative rather than in its own name. The violations set forth in the complaint are alleged to have occurred on or before October 20, 1946, and the time for commencing a new action has

now expired. *Bowles v. American Distilling Co.*, D. C., 62 F. Supp. 20, 22.

Under these circumstances, we believe that the motion for substitution should be granted. The federal courts have broad powers to amend pleadings in matters of form at any stage of the case. 28 U. S. C. A., Sec. 777; Rule 15, Federal Rules of Civil Procedure. This power is liberally construed to the end that the courts may be free of technical rules of procedure which delay the determination of causes on their merits. It is within the scope of this power to permit the substitution of a party for whose benefit an action was brought in place of the nominal plaintiff. This has been done both where the nominal plaintiff was found to lack authority to sue, and where the statute of limitations would have barred the commencement of a new action by the real plaintiff. *McDonald v. Nebraska*, 8 Cir., 101 F. 171. A fortiori it may be done here, where the nominal plaintiff originally had authority to sue, but was later deprived of it.

And, as was said in *Fleming v. Goodwin*, *supra*, where there was no compliance with Rule 25 (d) (165 F. 2d at pp. 337-338):

We are convinced that Rule 25 (d) of the Federal Rules of Civil Procedure was not promulgated for the purpose of hampering the Government in its efforts, through its proper officers, to enforce its laws or to obtain judgment for money rightfully due it or for statutory damages. The Rule was never intended to relieve defendants, in actions brought on behalf of the Government, of their statutory liability to the Government.

Since there was no showing of prejudice here, within the principles laid down in *United States v. Koike, supra*, and *Fleming v. Goodwin, supra*, the Court below erred in denying the motion for substitution.

CONCLUSION

The judgment below should be reversed; the motion for substitution of Tighe E. Woods, Housing Expediter, as party plaintiff, should be granted; and the cause should be remanded for further proceedings.

Respectfully submitted.

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APPENDIX A

Emergency Price Control Act of 1942, as amended (50 U. S. C. App. Secs. 901, et seq).

SECTION 1 (b). The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1947, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

SEC. 205. (c) The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act. Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred. Except as provided in section 205 (f) (2), such other proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred, and may also be brought in the district in which the defendant resides or transacts business, and process in such cases may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found: *Provided, however,* That all suits under subsection (e) of this section shall be brought in the district or county in which the defendant resides or has a place of business, an office, or an agent. Any such court shall advance on the docket and expedite the disposition of any criminal or other proceedings brought before it under this section. No costs shall be assessed against the Administrator or the United States Government in any proceeding under this Act.

SEC. 205 (e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges,

upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

28 U. S. C. Section 780 (Abatement Act) provides in part:

“* * * Where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an Insular Possession of the United States, or of a county, city, or other governmental agency of such Territory or Insular Possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.”

APPENDIX B

3. Pertinent provisions of the Rent Regulation for Housing (10 F. R. 3436).

SEC. 2. *Prohibition against higher-than-maximum rents.*

(a) *General Prohibition.*—Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no person shall demand or receive any rent for or in connection with the use or occupancy on and after the effective date of regulation of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by this regulation; and no person shall offer, solicit, attempt, or agree to do any of the foregoing. Lower rents than those provided by this regulation may be demanded or received.

SEC. 10. *Enforcement.*—Persons violating any provision of this regulation are subject to criminal penalties, civil enforcement actions and suits for treble damages as provided for by the act.

SEC. 13. *Definitions.*—(a) When used in this regulation the term:

(5) "Person" includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representatives of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing.

(8) "Landlord" includes an owner, lessor, sublessor, assignee or other person receiving or entitled to receive rent for the use or occupancy of any housing accommodations, or an agent of any of the foregoing.

(10) "Rent" means the consideration, including any bonus, benefit, or gratuity, demanded or received for or in connection with the use or occupancy of housing accommodations or the transfer of a lease of such accommodations.

APPENDIX C

Federal Rules of Civil Procedure (28 U. S. C.) following Section 723 (c):

Rule 6 (d). *For Motions—Affidavits.*—A written motion, other than one which may be heard *ex parte*, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on *ex parte* application. When a motion pursuant to this rule may be made when it is served with the motion; and, except as otherwise provided in Rule 59 (c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

Rule 15 (b). *Amendments to Conform to the Evidence.*—When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining

his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Rule 25 (d) *Public Officers; Death or Separation from Office*.—When an officer of the United States, the District of Columbia, a state, county, city, or other governmental agency, or any other officer specified in the Act of February 13, 1925, c. 229, § 11 (43 Stat. 941), U. S. C., Title 28, § 780, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.

No. 11929 Criminal.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

SAMUEL D. COLLINS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

JAMES M. CARTER,
United States Attorney,

ERNEST A. TOLIN, and

GEORGE M. BRYANT,

Assistant United States Attorneys,

600 United States Postoffice and
Courthouse Building, Los Angeles 12,
Attorneys for United States of America.

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No. 11929 Criminal.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SAMUEL D. COLLINS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

I.

Jurisdictional Statement.

The jurisdiction of this Court is not contested on this appeal.

II.

Statement of Facts.

The United States of America on August 11, 1947, applied to the United States District Court for the Southern District of California, Central Division, for a writ of *habeas corpus ad prosequendum*. This writ was granted by the Court and directed to the sheriff of Los Angeles County, directing the said sheriff to produce the appellant before the court upon charges of income tax evasion. On August 11, 1947, and subsequent dates the appellant was produced before the court.

Collins was represented by counsel, Percy Hammond [Tr. 2] and George N. Stahlman [Tr. 5]. Appellant was

very anxious to dispose of the matter and waived indictment by the grand jury and consented that the matter be presented by information [Tr. 2, 3]. No point seems to have been raised in this appeal as to the propriety of such action.

On August 15, 1947, the defendant proposed to plead guilty to the information on file in accordance with his waiver as to those counts charging violation of Section 145(b) of the Internal Revenue Code [Tr. 22 and 23] and entered a plea of not guilty to the counts charged in violation of Section 145(c) of the Internal Revenue Code [Tr. 23]. The Court, prior to taking the plea examined Collins at length. Collins was deaf [Tr. 35] and seemed to have considerable trouble in hearing the Court.

George M. Bryant, the Government attorney, requested on examination to determine the appellant's understanding of a plea [Tr. 6]. Judge Yankwich refused to take the plea until he was convinced that appellant understood the nature of the plea and its possible results [Tr. 6-19]. Collins was convicted upon his plea on August 15, 1947, and was sentenced to spend a period of 18 months in a Federal penitentiary upon Count 1 and the same upon Count 2, sentences to run consecutively. Thereafter Counts 3 and 4 were dismissed [Tr. 39].

On April 26, 1948, Collins filed a motion in the District Court to set aside the judgment and change his plea [R. 13]. This was heard without argument and the motion was ruled on by Judge Yankwich, who dismissed the contentions and denied the motion [R. 19]. On May 3, 1948, appellant filed notice of appeal [R. 21]. It is now prosecuted *in forma pauperis*, pursuant to order of this Court.

ARGUMENT.

I.

The Appellant Was Represented by Counsel.

The appellant was represented by counsel of his own choosing, Percy Hammond and George N. Stahlman [Tr. 2, 5].

All that the Constitution requires is that a defendant should be afforded a fair opportunity to secure counsel of his own choice with the accustomed incidents of consultation and an adequate opportunity of preparation. Rule 44 provides that if the defendant appears in court without counsel, then the Court is to advise him of his right to counsel. (Rule 44 F. R. Crim.)

II.

The Plea Was Properly Received.

The plea was properly received. Rule 11, Federal Rules of Criminal Procedure, provides that the Court may refuse to accept a plea of guilty and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. The record is here replete with the time that the trial court took to determine the understanding of the appellant of the nature of the charge and consequences of a plea to the charge.

III.

The Hearing by the Trial Court Was Adequate.

The Court properly denied the plaintiff's motion for withdrawal of plea. Rule 32(d), Federal Rules of Criminal Procedure, provides:

“(d) *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or while imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

“It is well settled that a motion for leave to withdraw a plea of guilty and to substitute a plea of not guilty is addressed to the sound discretion of the trial court; and further that the exercise of such discretion is reviewable . . .”

Camarota v. United States, 6 Cir., 2 F. 2d 650;

Ward v. United States, 6 Cir., 116 F. 2d 135;

United States v. Fox, 3 Cir., 130 F. 2d 56.

“The cases uniformly hold that motions to withdraw a plea of guilty should be denied where the plea of guilty was entered either by the defendant or his counsel in his presence, and if the defendant knew and understood what was being done and there were not present any circumstances of force, mistake, misapprehension, fear, inadvertence or ignorance of his rights and understanding of the consequences of the plea.”

United States v. Colonna, 142 F. 2d 210;

Title 18, U. S. C. A., Sec. 688.

In *Bergen v. United States* (145 F. 2d 181, 186), the Court states:

“In the absence of a controlling statute or rule of Court, the granting of denial of a motion to withdraw a plea of guilty is within the discretion of the trial court and is not a matter of right. *Kercheval v. United States*, 274 U. S. 220, 223, 47 S. Ct. 582, 71 L. Ed. 1009; *Gleckman v. United States*, 8 Cir., 16 F. 2d 670; *Scheff v. United States*, 8 Cir., 33 F. 2d 263; *Rachel v. United States*, 8 Cir., 61 F. 2d 360; *Jackson v. United States*, 8 Cir., 131 F. 2d 606, 609; *Ward v. United States*, 6 Cir., 116 F. 2d 135; *United States v. Fox*, 3 Cir., 130 F. 2d 56, certiorari denied 317 U. S. 666, 63 S. Ct. 74, 87 L. Ed. 535; *Tomlinson v. United States*, 68 App. D. C. 106, 93 F. 2d 562, 114 A. L. R. 1315, certiorari denied 303 U. S. 646, 58 S. Ct. 645, 82 L. Ed. 1102; *Roberto v. United States*, 7 Cir., 60 F. 2d 774.

“An abuse of the court’s discretion is refusing to allow a withdrawal of a plea of guilty is reversible error, but a mere showing of the denial of the motion is not sufficient. It is necessary that the accused show in support of his motion that the plea of guilty ‘should not be allowed to stand against him because of some reason existing when it was entered, but for which he would not have entered the plea, and that reason must amount to a fraud or an imposition upon him, or a misapprehension of his legal right.’ (*Rachel v. United States*, *supra* (61 F. 2d 362)). It has been held that the principles on which the motion to withdraw a plea of guilty may be granted or denied remain unchanged by Rule 2(4) of the Rules of Practice and Procedure in Criminal Cases providing that the motion shall be made within ten days after entry of plea and before sentence is imposed. *Farnsworth v. Zerbst*, 5 Cir., 98 F. 2d 541, 543.

“* * * While the burden is on the accused to show cause for the change of his plea, the court’s discretion should be exercised liberally, so as to promote the ends of justice and to safeguard the life and liberty of the accused, especially where the defendant is without the advice of counsel and his motion is seasonably made. And, in any case, the motion should not be denied where it is evident that the ends of justice would best be served by granting it.

“An intelligent and full understanding by the accused of the charge against him is a first requirement of due process. *Ammons v. King*, 8 Cir., 133 F. 2d 270, 272; *Smith v. O’Grady*, 312 U. S. 329, 61 S. Ct. 592, 85 L. Ed. 859. On a motion by an accused without counsel for the withdrawal of a plea of guilty on the ground of want of comprehension of the charge, the rights of the accused and the duties upon the trial court are not unlike their respective rights and duties when the question is whether the accused has competently waived his right to the assistance of counsel. ‘The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.’ *Johnson v. Zerbst*, 304 U. S. 458, 465, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461, 146 A. L. R. 357. So, while the accused in the present case had the right, without the advice of counsel, to enter a plea of guilty to the

charge against him, it rested upon the trial court, when the application for withdrawal of the plea was seasonably made, to determine whether, in the light of all pertinent evidence, the plea of guilty had been made with intelligence and comprehension. Circumstances important for consideration are the nature of the charge against the accused, his apparent intelligence and ability to fully comprehend the charges against him, the gravity of the offense charged, the timeliness of the motion to withdraw the plea, and the fact that the accused before entering his plea did not have the advice of counsel.

“* * * Moreover, the question here is not the probable guilt of the accused nor what caused him to change his mind, but whether, at the time of the entry of his plea, he had the requisite understanding of the charges against him.”

Summary of Argument.

The facts herein are uncontradicted as stated in appellant's opening brief. The Government agreed that this court has the power to consider this appeal; it believes that the Court in this case adequately and fairly examined the defendant to be sure that he understood the nature and possible effects of his plea. The Court was satisfied from his examination, which constitutes the majority of the evidence contained in the Transcript, that the defendant understood what was happening to him. He even gave additional time for the defendant to confer with his counsel. Upon the whole record, it is submitted that the constitutional rights of the defendant were fully protected and that the hearing before the trial court was adequate.

Conclusion.

Appellee therefore submits that this court should not vacate the judgment of conviction and thereby allow the appellant at this late date to reopen the trial of a matter where it is possible that witnesses and evidence may be not as easily available as they were at the time of trial and plea.

Dated: At Los Angeles, California, this 22nd day of December, 1948.

Respectfully submitted,

JAMES M. CARTER,
United States Attorney,

ERNEST A. TOLIN, and

GEORGE M. BRYANT,

Assistant United States Attorneys,

By GEORGE M. BRYANT,

Assistant United States Attorney,

Attorneys for United States of America.

No. 11934

United States
Circuit Court of Appeals
for the Ninth Circuit

WARREN H. HAGER,

Appellant,

vs.

CLYDE E. GORDON,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Territory of Alaska, Fourth Judicial Division

JUL 31 1948

PAUL R. O'BRIEN

No. 11934

United States
Circuit Court of Appeals
for the Ninth Circuit

WARREN H. HAGER,

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Transcript of Record

Upon Appeal from the District Court of the United States
for the Territory of Alaska, Fourth Judicial Division

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ATTORNEYS OF RECORD

Attorneys for Plaintiff and Appellant

BAILEY E. BELL

JULIEN A. HURLEY

Fairbanks, Alaska

Attorney for Defendant and Appellee

WARREN A. TAYLOR

Fairbanks, Alaska [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court for the Territory of Alaska,
Fourth Judicial Division

No. 5628

WARREN L. HAGER,

Plaintiff

vs.

CLYDE E. GORDON,

Defendant

SECOND AMENDED COMPLAINT

Comes now the above named plaintiff, and for his causes of action against the above named defendant, alleges and states:

FIRST CAUSE OF ACTION

I.

That the plaintiff is now and at all times herein mentioned has been the owner of and entitled to the possession of the hereinafter described property, which is now located in the Fairbanks Recording District, Fourth Judicial Division of the Territory of Alaska, and is particularly described as follows, to-wit:

One certain power boat with stern wheel named the "Elaine G" and one certain power driven barge used in connection with the "Elaine G" in the handling of freight and cargo on the Tanana, Yukon and Chena Rivers in Alaska; said property being now in the

Chena River near Fairbanks, Alaska, of the reasonable market value of \$25,000.00.

II.

That on or about the 20th day of April, 1946, the above plaintiff was in possession of the above described property, and the defendant took possession of the same unjustly, unlawfully and capriciously, and is now, and has been since said date, unjustly, unlawfully and forceably holding possession thereof, and is wrongfully withholding from this plaintiff all of said personal property above described. [1]

SECOND CAUSE OF ACTION

Plaintiff further alleges for this his second cause of action, as follows:

II.

Plaintiff further alleges for this his second adopts in this cause of action as if fully set out herein, all of the allegations of his First Cause of Action, and in addition thereto alleges:

III.

That the above enumerated and described personal property is properly fitted for handling, hauling and transferring large amounts of freight and cargo on the rivers and waters of Alaska, and on and after the 20th day of April, 1946, the above named defendant has used said boat and property arbitrarily and against the will of this plaintiff and during the months of May, June, July, August,

September and October, hauled many tons of freight on the Chena, Tanana and Yukon rivers, and that the reasonable value of the use of said equipment was Ten Thousand (\$10,000.00) Dollars, and that the use was brought about by the defendant wrongfully taking possession thereof, and holding the same adversely to this plaintiff, and thereby deprived this plaintiff of the use thereof to his damage in the sum of Ten Thousand (\$10,000.00) Dollars.

Wherefore, plaintiff prays judgment on his first cause of action as follows, to-wit:

1. For a judgment requiring the defendant to return and restore to the plaintiff all of the above described personal property, and in the event said personal property cannot be restored, then for a judgment against the defendant for a reasonable market value thereof in a sum of Twenty-five Thousand (\$25,000.00) Dollars, together with interest thereon at the rate of six (6%) per cent from the 20th day of April, 1946.

2. For the further judgment of the Court on plaintiff's second cause of action for the sum of Ten Thousand (\$10,000.00) Dollars, damages, [2]

3. For all costs of this action including a reasonable sum as attorney's fees for plaintiff's attorneys, and for such other and further relief as the Court deems just in the premises.

BAILEY E. BELL and
JULIEN A. HURLEY
Attorneys for Plaintiffs.

United States of America
Territory of Alaska—ss.

Warren L. Hager, being first duly sworn on oath, deposes and says: That he is the plaintiff above named; that he has read the above Second Amended Complaint and knows the contents thereof, and that the same is true and correct as he verily believes.

[Seal] /s/ WARREN L. HAGER

Subscribed and sworn to before me this 1st day of October, 1947.

/s/ BAILEY E. BELL,

Notary Public in and for the
Territory of Alaska.

My commission expires: 1/28/49

Service of a copy of the above is hereby acknowledged this 1st day of October, 1947.

LATHANAN & TAYLOR

J. A. Lathanan, Jr.

[Endorsed]: Filed Oct. 1, 1947 [3]

[Title of District Court and Cause]

ANSWER

Comes now the defendant above-named and for his answer to the Second Amended Complaint of the Plaintiff now on file herein, admits, denies and alleges as follows:

I.

Defendant denies each and every allegation contained in paragraphs I and II of the First Cause of Action stated in Plaintiff's Second Amended Complaint, and the whole thereof, save and except that the Defendant admits that he has had possession of the property described in said Cause of Action at all times mentioned in said Cause of Action, and that said boat and barge are located in the Fairbanks Recording Precinct, Fourth Division, Territory of Alaska; and Defendant affirmatively alleges that he has had such possession at all times since said boat and barge were built.

II.

For answer to paragraph III of Plaintiff's in Plaintiff's Second Amended Complaint, Defendant denies each and every allegation contained in paragraph II thereof and the whole of said paragraph.

III.

For an answer to paragraph III of Plaintiff's Second Cause of Action, Defendant admits that the

said boat and barge are fitted for hauling freight and cargo on the rivers and waters of Alaska during the open session of navigation and Defendant denies each and every other allegation in said paragraph contained. [4]

As a further defense and by way of his First Affirmative Defense to the First and Second Causes of Action stated in Plaintiff's Second Amended Complaint, Defendant alleges as follows:

I.

That the Defendant, at all times mentioned in Plaintiff's Amended Complaint, was and now is the owner in possession of and entitled to the possession of the power boat and barge described in Plaintiff's Second Amended Complaint, and that said ownership and right of possession is exclusive and absolute.

Wherefore, having fully answered the Second Amended Complaint of the Plaintiff now on file herein, the Defendant prays that the same be dismissed and the Plaintiff take nothing thereby; and that the Defendant have and recover from the Plaintiff his costs and disbursements incurred herein including a reasonable sum as attorney's fees and for such other and further relief as the Court deems just in the premises.

LATHANAN & TAYLOR

/s/ By J. A. Lathanan, Jr.

United States of America
Territory of Alaska—ss.

Clyde E. Gordon, being first duly sworn, on oath deposes and says: That he is the defendant above-named; that he has read the above Answer and knows the contents thereof, and that the same is true and correct as he verily believes.

[Seal] /s/ CLYDE E. GORDON

Subscribed and sworn to before me this 20th day of October, 1947.

/s/ J. A. LATHANAN, JR.

Notary Public for Alaska

My Commission expires May 20, 1951.

Service acknowledged by receipt of copy of the foregoing Answer this 20th day of October, 1947.

BAILEY E. BELL

By F. W. Dillard

[Endorsed]: Filed Oct. 21, 1947. [5]

[Title of District Court and Cause]

REPLY

Comes now the above named plaintiff and for reply to the answer filed herein denies and admits as follows, to-wit:

I.

Plaintiff denies all affirmative matter set forth

in paragraph number I., and the whole thereof, and specifically denies that the defendant has had possession of said boat and barge at all times since it was built.

II.

Plaintiff denies the allegations in paragraph marked I., on page two of the answer, and the whole thereof, and specifically denies that the defendant is the owner of and entitled to the possession of the boat and barge described in plaintiff's complaint, and denies that the defendant owns any part thereof, and denies that the defendant is entitled to the possession thereof.

Wherefore, plaintiff having fully replied to defendant's answer prays that he may recover as in his complaint asked for and for such other and further relief as he is, by law entitled to.

/s/ BAILEY E. BELL

/s/ JULIEN A. HURLEY

Attorneys for Plaintiff. [6]

United States of America,
Territory of Alaska—ss.

Warren L. Hager, being first duly sworn, on oath says; That he is the Plaintiff above named; that he has read the above reply and knows the contents thereof, and that the same is true and correct as he verily believes.

[Seal]

/s/ WARREN L. HAGER

Subscribed and sworn to before me this 29th day of December, 1947.

/s/ BAILEY E. BELL

Notary Public, Territory of Alaska

My Commission expires 1-28-49.

Service acknowledged by receipt of a copy of the foregoing reply this 29th day of December, 1947.

/s/ WARREN A. TAYLOR

Attorney for Defendant.

[Endorsed]: Filed Dec. 29, 1947. [7]

[Title of District Court and Cause]

INSTRUCTIONS

Members of the Jury: You are instructed:

I.

A.

That the Plaintiff, Hager, makes the following claims, to-wit: That in the latter part of 1944 he and the Defendant, Gordon, entered into an oral agreement as follows, to-wit:

(1) The Defendant, Gordon, should furnish the money to build, equip and operate a stern wheel power boat (afterwards named "Elaine G"), and a power driven barge (afterwards named "Elaine G");

(2) That the Plaintiff, Hager, would operate said boat and barge and apply the earnings thereof

to the payment of the cost of building, equipping and operating said boat and barge;

(3) That when the earnings of said boat and barge paid off the cost of building, equipping and operating said boat and barge, the same would be the property of the Plaintiff, Hager, free of all liabilities;

(4) That at all times before such earnings of said boat and barge paid off the cost of building, equipping and operating the same, the Plaintiff, Hager, was to be the owner of said boat and barge;

(5) That before the 20th day of April, 1946, the earnings of said boat and barge had paid off all of the cost of building, equipping and operating said boat and barge.

B.

You are instructed that if the Plaintiff, Hager, has proved, by a preponderance of the evidence in this case, each of the matters set forth in sub-paragraphs (3), (4) and (5) of Paragraph A of this Instruction, then, and only then, should you find in favor of the Plaintiff and sign Verdict Number I. If the Plaintiff fails to prove the matters set forth in any of said sub-paragraphs (3), (4) and (5) above, by a preponderance of the evidence in this case, or if the evidence in this case as to the matters set forth in said sub-paragraphs (3), (4) and (5) is equally divided, you should find against the Plaintiff on the issues set forth

in this case, and you should find for the Defendant, Gordon, and sign Verdict Number II.

II.

The Defendant, Gordon, claims that his agreement with the Plaintiff Hager, in the latter part of 1944 was as follows, to-wit:

(a) That he, Gordon, was to build the boat and barge afterwards known as "Elaine G";

(b) That said Hager would operate said boat and barge, "Elaine G", and apply the earnings thereof to the repayment of the cost of building, equipping and operating said boat and barge;

(c) That when the earnings from said boat and barge paid off the cost of building, equipping and operating said boat and barge he, Gordon, would give him, Hager, a title to said boat and barge; [9]

(d) That the earnings from said "Elaine G" boat and barge had not, on or before the 20th day of April, 1946, paid off the cost of building, equipping and operating said boat and barge;

(e) That he, Gordon, never executed any title transferring said "Elaine G" boat and barge to said Hager, or anyone else.

You are instructed that you should consider the above claims of the Defendant, Gordon, at the same time that you consider the claims of the Plaintiff, Hager, mentioned in Instruction Number I, and give effect to such claims as you believe to be true.

III.

(a) You are instructed that this is an action in claim and delivery, which can be maintained by the Plaintiff, Hager, only in case he was the owner of the "Elaine G" boat and barge upon the 20th day of April, 1946, and thereafter. If the owner of said boat and barge, upon the 20th day of April, 1946, was the Defendant, Gordon, then the Plaintiff cannot prevail in this action, and this is true without regard to whether or not the earnings of said "Elaine G" boat and barge had paid off the cost of building, equipping and operating said boat and barge.

(b) You are further instructed that unless the Plaintiff, Hager, proves by a preponderance of the evidence in this case that he, Hager, and not the Defendant, Gordon, was the owner of said "Elaine G" boat and barge upon the 20th day of April, 1946, [10] you should find against the Plaintiff, Hager, and in favor of the defendant, Gordon.

(c) You are instructed that if you believe from the evidence Defendant, Gordon, furnished all the money for the building, equipping and operating (except salary for Plaintiff, Hager) of the boat and barge "Elaine G" prior to April 20, 1946, the title and ownership of said boat and barge would have been in him, Gordon, unless the Plaintiff has proved by a preponderance of the evidence in this case that he and the Defendant agreed, as men-

tioned in sub-paragraph (4) of Paragraph A of Instruction Number I, to-wit: That at all times before the earnings of said "Elaine G" boat and barge paid off the cost of building, equipping and operating said boat and barge, the said Hager was to be the owner of said boat and barge.

IV.

You are instructed that if you find in favor of the Plaintiff, Hager, as to the ownership of said boat and barge on April 20, 1946 and thereafter, and as to the earnings of said boat and barge having paid off the cost of building, equipping and operating the same, then it would be your duty to find that the Plaintiff, Hager, was damaged in the sum of \$10,000 by the taking and withholding of said boat and barge by the Defendant, Gordon, and you should further find in your Verdict that the value of said boat and barge, at the time of said taking, was the sum of \$55,000. These matters are set forth in Verdict Number I. [11]

Except where the court declares the evidence to be conclusive, you, members of the jury, are the judges of the value of all of the evidence admitted in the case. However, your power of judging the effect of evidence is not arbitrary, but must be exercised with legal discretion and in subordination to the rules of evidence as administered by and given to you by the court in its instructions.

You should not permit the remarks or expressions of opinion by the attorneys in the case to influence your judgment unless the same are in

conformity with the evidence or are logical deductions therefrom.

Your duty is to determine the facts of the case from the evidence submitted in conformity with the instructions of the court.

It is the duty of the judge of this court to instruct you as to the law involved in this case and it is your duty, as jurors, to accept as law and to follow the same, whatever is laid down to you as the law of the case by the judge of this court. [12]

You are instructed that the laws of the Territory of Alaska lay down the following general rules for your guidance as to the value of evidence, to-wit:

1. That your power of judging the effect of evidence is not arbitrary, but to be exercised with legal discretion and in subordination to the rules of evidence.

2. That you are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number, or against a presumption or other evidence satisfying to your minds.

3. That a witness wilfully false in one part of his testimony may be distrusted in others.

4. That when the evidence is contradictory, the findings shall be in accordance with the preponderance of the evidence.

5. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to

produce and of the other to contradict; and, therefore,

6. That if the weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

7. That oral admissions of a party should be viewed with caution. [13]

You are instructed as follows:

1. That by "preponderance of evidence" is meant the amount of evidence which taken on the whole produces the stronger impression upon the minds of the jury and convinces them of its truth when weighed against the evidence in opposition thereto;

2. That you should not consider any evidence sought to be introduced, but excluded by the court, nor should you consider any evidence that has been stricken from the record by the court;

3. That it is manifestly impossible for the court to cover the law of this case in a few instructions, and that, therefore, you should consider all the instructions together and not disconnectedly;

4. That you should endeavor to agree upon a verdict and should calmly reason with your fellows with the view of arriving at a verdict. You should not refuse to agree from pride of opinion, nor should you surrender any conscientious views

founded on the evidence or lack of evidence. [14]

Pursuant to the foregoing Instructions, I have prepared two forms of verdict, which are self-explanatory, for you to take into your jury room. You should elect a foreman and by him sign the verdict upon which you unanimously agree, and return it into the court as your verdict.

Herewith I hand you these Instructions for your guidance, together with the above-mentioned forms of verdict, the exhibits that have been introduced in evidence, and the pleadings in the case. Return all of these into Court with your verdict.

Dated at Fairbanks, Alaska, this 28th day of January, 1948.

HARRY E. PRATT

District Judge.

[Endorsed]: Filed Jan. 28, 1948. [15]

[Title of District Court and Cause]

VERDICT NUMBER I

We, the jury, duly empaneled and sworn to try the above-entitled case, do, from the evidence and the law of the case, find in favor of the Plaintiff, Hager, and against the Defendant, Gordon, and that the Plaintiff, Hager, was, upon the 20th day of April, 1946, and at all times thereafter, the owner of and entitled to the possession of that certain stern wheel power boat named "Elaine G",

and that certain power driven barge named "Elaine G";

We further find that the value of said boat and barge, upon the 20th day of April, 1946, was the sum of \$55,000.00, and that the Plaintiff has suffered damages in the sum of \$10,000.00 by the taking and withholding of said boat and barge by the Defendant.

Done at Fairbanks, Alaska, this.....day of January, 1948.

.....

Foreman. [16]

[Title of District Court and Cause]

VERDICT NUMBER II.

We, the Jury, duly empaneled and sworn to try the above-entitled cause, do, from the evidence and the law of the case, find in favor of the Defendant, Gordon, and against the Plaintiff, Hager, and that upon the 20th day of April, 1946, and thereafter, the Defendant, Gordon, was the owner of and entitled to the possession of that certain stern wheel boat named "Elaine G", and that certain power driven barge named "Elaine G".

Done at Fairbanks, Alaska, this 28th day of January, 1948.

DONALD McDONALD III

Foreman.

Jan. 28, 1948.

Entered in Court Journal No. 36, Page 121.

[Endorsed]: Filed Jan. 28, 1948. [17)

[Title of District Court and Cause]

MOTION FOR NEW TRIAL

Comes now Warren L. Hager, and moves the court to set aside the verdict of the Jury in the above-entitled cause, and to grant a new trial, and for grounds states:

I.

That the Court erred in sustaining the defendants' objections to competent questions, thereby preventing the introduction of competent evidence.

II.

That the Court erred in excluding competent, material and relevant evidence throughout the entire proceedings.

III.

That the court erred in sustaining the numerous objections to the plaintiff's questions, which if answered, would have caused competent evidence to have been admitted on the part of the plaintiff.

IV.

The Court erred in admitting incompetent evidence on the part of the defendant.

V.

That the court erred in giving the following instructions to the Jury, which were excepted to by

the plaintiff and exceptions were allowed by the Court.

(IV) That at all times before such earnings of said boat and barge paid off the cost of building, equipping and operating the same, the Plaintiff, Hager, was to be the owner of said boat and barge. [18]

(II) The Defendant, Gordon, claims that his agreement with the Plaintiff, Hager, in the latter part of 1944 was as follows, to-wit:

(a) That he, Gordon, was to build the boat and barge afterwards known as "Elaine G";

(b) That said Hager would operate said boat and barge, "Elaine G", and apply the earnings thereof to the repayment of the cost of building, equipping and operating said boat and barge;

(c) That when the earnings from said boat and barge paid off the cost of building, equipping and operating said boat and barge he, Gordon, would give him, Hager, a title to said boat and barge;

(d) That the earnings from said "Elaine G" boat and barge had not, on or before the 20th day of April, 1946, paid off the cost of building, equipping and operating said boat and barge;

(e) That he, Gordon, never executed any title transferring said "Elaine G" boat and barge to said Hager, or anyone else.

You are instructed that you should consider the above claims of the Defendant, Gordon, at the same

time that you consider the claims of the Plaintiff, Hager, mentioned in instruction Number I, and give effect to such claims as you believe to be true.

(III) (a) You are instructed that this is an action in claim and delivery, which can be maintained by the Plaintiff, Hager, only in case he was the owner of the "Elaine G" boat and barge upon the 20th day of April, 1946, and thereafter. If the owner of said boat and barge, upon the 20th day of April, 1946, was the Defendant, Gordon, then the Plaintiff cannot prevail in this action, and this is true without regard to whether or not the earnings of said "Elaine G" boat and barge had paid off the cost of building, equipping and operating said boat and barge.

(b) You are further instructed that unless the Plaintiff, Hager, proves by a preponderance of the evidence in this case that he, Hager, and not the Defendant, Gordon, was the owner of said "Elaine G" boat and barge upon the 20th day of April, 1946, you should find against the Plaintiff, Hager, and in favor of the defendant, Gordon.

(c) You are instructed that if you believe from the evidence Defendant, Gordon, furnished all the money for the building, equipping and [19] operating (except salary for Plaintiff, Hager) of the boat and barge "Elaine G" prior to April 20, 1946, the title and ownership of said boat and barge would have been in him, Gordon, unless the Plaintiff has proved by a preponderance of the evidence

in this case that he and the Defendant agreed, as mentioned in sub-paragraph (4) of Paragraph A of Instruction Number I, to-wit: That at all times before the earnings of said "Elaine G" boat and barge paid off the cost of building, equipping and operating said boat and barge, the said Hager was to be the owner of said boat and barge.

VI.

That the verdict of the Jury is contrary to the evidence and is contrary to the Law.

VII.

That the verdict is not sustained by any confident evidence; is against the clear weight of the evidence and should be set aside, vacated and a new trial granted.

VIII.

That the verdict as returned into court was arrived at unlawfully, and was arrived at bias, prejudice and misconduct on the part of certain Jurors and was rendered for sympathy for the said Defendant.

IX.

That the Jury in arriving at the verdict took into consideration the income tax matter, which was excluded by the court, which prevented a fair and impartial verdict.

Plaintiff Therefore, prays the Court to grant a new trial in said cause, and to do justice between

the parties regardless of the purported verdict rendered.

JULIEN A. HURLEY and
BAILEY E. BELL

Attorneys for Plaintiff.

Copy of the above motion served this 31st day
of January, 1948.

/s/ WARREN A. TAYLOR,

Attorney for Defendant.

[Endorsed]: Filed Jan. 31, 1948. [20]

[Title of Cause]

ORDER

The Court having on February 6, 1948, heard the arguments of respective counsels in this cause on the Motion for a New Trial and now being fully advised in the premises, it was Ordered that the Motion be Denied.

Feb. 13, 1948.

Entered in Court Journal No. 36, Page 152. [21]

In the District Court for the Territory of Alaska,
Fourth Division

No. 5628

WARREN L. HAGER,

Plaintiff,

vs.

CLYDE E. GORDON,

Defendant.

JUDGMENT

This cause coming on regularly for trial on the 26th day of January, 1948, the Plaintiff appearing in person and by his attorneys, Bailey Bell and Julien A. Hurley, and the defendant appearing in person and by his attorney, Warren A. Taylor, and the jury having been duly empaneled and sworn to try the issues in the above-entitled action and evidence having been submitted on behalf of the plaintiff and defendant and the arguments of counsel having been made for the plaintiff and defendant and the Court having duly instructed the jury as to the law, and the said jury having considered the law and the evidence, duly returned into Court their verdict on the 28th day of January, 1948, in words and figures following, to-wit:

VERDICT NUMBER II.

We, the Jury, duly empaneled and sworn to try the above-entitled cause, do, from the evidence and the law of the case, find in favor of the Defendant,

Gordon, and against the Plaintiff, Hager, and that upon the 20th day of April, 1946, and thereafter, the Defendant, Gordon, was the owner of and entitled to the possession of that certain stern wheel boat named "Elaine G", and that certain power driven barge named "Elaine G".

Done at Fairbanks, Alaska, this 28th day of January, 1948.

/s/ DONALD McDONALD III
Foreman. [22]

Now, therefore, upon motion of the attorney for the defendant and in accordance with the verdict of the jury,

It is hereby ordered, adjudged and decreed that the Plaintiff take nothing by said action and that the Defendant have and recover his costs herein expended together with the sum of \$5000.00 as attorney's fees.

Dated at Fairbanks, Alaska, this 22nd day of March, 1948.

HARRY E. PRATT
District Judge.

Service of copy of acknowledged this.....day of Feb., 1948.

BAILEY E. BELL
Atty. for Plaintiff.

Lodged Feb. 18, 1948.

Entered in Court Journal No. 36, Page 164-165.

[Endorsed]: Filed Mar. 22, 1948. [23]

[Title of District Court and Cause]

NOTICE OF APPEAL

The name and address of Appellant is: Warren L. Hager, of Fairbanks, Alaska.

Name and address of Appellant's Attorneys' are: Julien A. Hurley and Bailey E. Bell of Fairbanks, Alaska.

Name and address of Appellee is: Clide E. Gordon, Fairbanks, Alaska.

Name and address of the Attorney of record for Appellee is: Warren A. Taylor, of Fairbanks, Alaska.

The action is one for the recovery of personal property and for damage for the wrongful withholding thereof.

The action is based upon and filed under and by virtue of the Laws of the Territory of Alaska, and attention is called to Chapter LXXX of the Compiled Laws of Alaska, 1933.

That at the close of all of the evidence the Court instructed the Jury, and it is our contention, erred therein, which errors prevented this plaintiff from having a fair trial.

That the jury rendered an unconscionable verdict, which was contrary to all of the evidence, and not supported by any competent evidence, and contrary to the great weight of the evidence.

That thereafter, and within three days, the plaintiff filed his motion for a new trial in said

cause; which is hereby made a part of this notice by reference as fully as if set out herein. [24]

That thereafter, and on the 12th day of February, 1948, the Honorable Harry E. Pratt, Judge of the above-entitled Court erroneously overruled said motion and denied the plaintiff any recovery; which was error on the part of the Court.

I, Warren L. Hager, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment above-mentioned on the grounds set forth below:

I.

The Court erred in overruling plaintiff's Motion for a new trial.

II.

The Court erred in sustaining the defendant's objections to competent questions, thereby preventing the introduction of competent evidence.

III.

The Court erred in refusing the offers of the plaintiff to provide competent, material and relevant facts.

IV.

The Court erred in admitting incompetent evidence on the part of the defendant.

V.

The Court erred in giving instruction to the Jury which prevented the plaintiff from having a fair trial.

VI.

The Court erred in refusing to give the offered instructions.

VII.

The verdict, as returned into court, was arrived at unlawfully and was based on prejudice and misconduct on the part of certain jurors.

VIII.

That the Jury in arriving at its verdict, considered the income tax matter as advanced and argued by defendant's attorney; which prevented a fair and impartial verdict.

IX.

Errors of law occurring at the trial on the part of the Court. Error of the Court in not instructing the Jury to render a verdict for the plaintiff. [25] Error of the court in not taking the case from the Jury and rendering judgment for the plaintiff on motion and request of plaintiff at the close of all the evidence.

Respectfully submitted,

WARREN L. HAGER
Plaintiff.

BAILEY E. BELL and
JULIEN A. HURLEY
Attorneys for Plaintiff.

Service of a copy of the above is hereby acknowledged this 2nd day of February, 1948.

/s/ WARREN A. TAYLOR

Attorney for Defendant.

[Endorsed]: Filed Mar. 2, 1948. [26]

[Title of District Court and Cause]

MOTION FOR A NEW TRIAL

Comes now the above-named plaintiff, Warren L. Hager, and moves the Court to grant a new trial in the above-entitled cause, and for grounds of this motion, states:

I.

That by the rules of the judge of this Court it is necessary to file a motion for a new trial within five (5) days from the return and filing of a verdict by a jury.

On January 28, 1948 a verdict was rendered in the above-entitled cause; on January 31, 1948 a motion for a new trial was filed by the plaintiff, which was argued on February 6, 1948; denied February 13, 1948 and then the Judge of this Court went to the Continental United States and did not return to the bench until March 22, 1948; on March 22, 1948 the judge of this court rendered his judgment in this case in favor of the defendant, and rendered additional judgment of granting the defendant judgment against the plaintiff for

Five Thousand (\$5,000.00) Dollars as an Attorneys fee in said case.

II.

This plaintiff now moves the Court to set aside, vacate and hold for naught the judgment rendered herein on the 22nd, day of March, 1948 in its entirety for all of the reasons heretofore in his motion for a new trial filed in this Court on the 31st day of January, 1948, and hereby makes his motion for a new trial a part of this motion for a new trial as fully as if set out herein in full.

III.

Plaintiff specifically moves the Court to set aside, vacate and hold for naught the judgment rendered on the 22nd day of March, 1948 granting the defendant a judgment for an attorney's fee against [27] the plaintiff in the sum of \$5,000.00, and as grounds therefore, states: that said judgment was not within the power of the court to grant.

That it was granted without any evidence being provided by any person, and without any evidence having been produced to the Court as to the reasonableness of said fee, and the same is excessive, oppressive and unreasonable, and that the Honorable Warren A. Taylor, who is the Attorney for the defendant, was only engaged in one way in the trial of this case, or in the preparation of the pleadings to the extent of Three (3) days.

IV.

For the further reason that the amendment to the Alaska Statutes purporting to authorize the granting of judgment to the prevailing party was not in force and effect at the time this suit was filed and the controversy arose, which caused the litigation.

That the amendment to Chapter 58 of the Session Laws of Alaska, 1937, is void and not having been properly passed and approved as the law required and is unconstitutional and void.

Wherefore, Plaintiff prays the court to grant a new trial, and to set aside each of the judgments herein rendered on the 22nd, day of March, 1948; one of which denied the plaintiff any right of recovery, and the other granted the defendant a judgment for \$5,000.00 for an Attorney's fee against the plaintiff, and for such other and further relief as is just and equitable in the premises.

/s/ J. A. HURLEY

/s/ BAILEY E. BELL

Attorney for Plaintiff. [28]

United States of America,
Fourth Judicial Division,
Territory of Alaska—ss.

Warren L. Hager, being first duly sworn, on oath, deposes and says:

That he is the plaintiff above-named; that he

has read the above and foregoing Motion for a New Trial; knows the contents thereof and that the same is true, as he verily believes.

[Seal] /s/ WARREN L. HAGER

Subscribed and sworn to before me this 24th day of March 1948.

BAILEY E. BELL

Notary Public in and for the Territory of Alaska.

My commission expires: 1/28/49.

Service of a copy of the above is hereby acknowledged this 24th day of March, 1948.

WARREN A. TAYLOR

By Bessie Akers

Attorney for Plaintiff.

[Endorsed]: Filed Mar. 24, 1948. [29]

[Title of Cause]

ORDER

The Plaintiff was represented by Bailey E. Bell; the defendant by Warren A. Taylor.

Respective counsel submitted the Motions for a New Trial without argument.

It was ordered that the Motions be denied.

Mar. 29, 1948.

Entered in Court Journal No. 36, Page 182. [30]

[Title of District Court and Cause]

NOTICE OF APPEAL

The name and address of Appellant is: Warren L. Hager, of Fairbanks, Alaska.

Name and address of Appellant's Attorneys are: Julien A. Hurley and Bailey E. Bell of Fairbanks, Alaska.

Name and address of Appellee is: Clyde E. Gordon, Fairbanks, Alaska.

Name and address of the Attorney of Record for Appellee is: Warren A. Taylor, of Fairbanks, Alaska.

This action is one for the recovery of personal property and for damage for the wrongful withholding thereof.

The action is based upon and filed under and by virtue of the Laws of the Territory of Alaska, and attention is called to Chapter LXXX of the Compiled Laws of Alaska, 1933.

That at the close of all of the evidence the Court instructed the jury, and it is our contention, erred therein, which errors prevented this plaintiff from having a fair trial.

That the jury rendered an unconscionable verdict, which was contrary to all of the evidence, and not supported by any competent evidence, and contrary to the great weight of the evidence.

That thereafter, and within three days, the plaintiff filed his motion for a new trial in said

cause; which is hereby made a part of this notice by reference as fully as if set out herein.

That thereafter, and on the 12th day of February, 1948, the Honorable Harry E. Pratt, Judge of the above-entitled Court erroneously overruled said motion and denied the plaintiff any recovery; which was [31] error on the part of the Court.

That after the overruling of said motion, and within thirty (30) days thereafter, the plaintiff filed his notice of Appeal in this case and before judgment was actually rendered the Judge of this Court left the Territory of Alaska, for a trip to the continental United States and returned to the bench and court on March 22, 1948.

That the Court rendered judgment in this case on March 22, 1948, denying plaintiff any recovery and taxed all costs of said case against plaintiff, which was error, and then erroneously rendered a judgment for the defendant for \$5,000.00 Attorney's fee against the plaintiff without any evidence whatsoever having been introduced or even offered, to base said judgment on, and that said judgment is excessive, unjust, oppressive and beyond the powers of the court to render, and there is no valid Statute of the Territory of Alaska and no laws of the United States of America to authorize such a judgment.

That within five (5) days after the said judgment was rendered and on the 24th day of March, 1948, plaintiff filed his motion for a new trial and

especially directed it to the part of the judgment awarding the defendant an attorney's fee of \$5,000.00; which motion was by the court overruled, and excepted to by the plaintiff and an exception was allowed to the plaintiff by the court.

I, Warren L. Hager, hereby appeal to the United State Circuit Court of Appeals for the Ninth Circuit, from the judgment above-mentioned on the grounds and for the reasons above set forth and as set out below:

I.

The Court erred in overruling plaintiff's Motion for a New Trial.

II.

The Court erred in overruling the motion for a new trial filed on March 24, 1948, which motion was overruled on the 29th day of March, 1948.

III.

The Court erred in sustaining the defendant's objections to competent question,s thereby preventing the introduction of competent evidence. [32]

IV.

The Court erred in refusing the offers of the plaintiff to provide competent, material and relevant facts.

V.

The Court erred in admitting incompetent evidence on the part of the defendant.

VI.

The Court erred in giving instructions to the Jury which prevented the plaintiff from having a fair trial, which instructions were objected to and excepted to by the plaintiff and said exceptions were by the court allowed.

VII.

The Court erred in refusing to give the plaintiff's offered instructions as shown in the record which are made a part of this notice by reference as fully as if set out herein in full.

VIII.

The Court erred in not instructing the jury to return a verdict for the plaintiff for the recovery of the boat and barge at the close of all of the evidence for the reason the plaintiff has fully established his right of possession and the defendant had offered no proof in denial thereof and there was no issue for the jury to determine except the amount if any damages plaintiff was entitled to recover.

IX.

The verdict, as returned into Court, was arrived at unlawfully and was based on prejudice and misconduct on the part of certain jurors, was contrary to the law, was contrary to the facts, was not supported by any competent evidence and was against the clear weight of the evidence.

X.

That the jury in arriving at its verdict, considered the income tax matter as advanced and argued by defendant's attorney; which prevented a fair and impartial verdict when the income tax matter was not a proper issue in this case. [33]

XI.

Errors of law occurring at the trial on the part of the Court.

XII.

Error of the Court in not taking the case from the jury and rendering judgment for the plaintiff on motion and request of plaintiff at the close of all the evidence.

Respectfully submitted,

/s/ WARREN L. HAGER,
Plaintiff.

/s/ JULIEN A. HURLEY and
BAILEY E. BELL,
Attorneys for Plaintiff.

Service of a copy of the above is hereby acknowledged this 9th day of April, 1948.

WARREN A. TAYLOR—MAE
Attorney for Defendant.

[Endorsed]: Filed April 9, 1948. [34]

[Title of District Court and Cause]

ASSIGNMENT OF ERRORS

Comes now above named Plaintiff, Warren L. Hager, and for Assignment of Errors in the above entitled cause alleges and states:

I.

That the Court erred in overruling the Plaintiff's motion for a new trial which motion is in words and figures as follows:

“No. 5628.

MOTION FOR NEW TRIAL

Comes now Warren L. Hager, and moves the court to set aside the verdict of the Jury in the above-entitled cause, and to grant a new trial, and for grounds states:

I.

That the Court erred in sustaining the defendant's objections to competent questions thereby preventing the introduction of competent evidence.

II.

That the Court erred in excluding competent, material and relevant evidence throughout the entire proceedings.

III.

That the Court erred in sustaining the numerous objections to the plaintiff's questions, which if answered, would have caused competent evidence to have been admitted on the part of the plaintiff.

IV.

The Court erred in admitting incompetent evidence on the part of the defendant. [35]

V.

That the Court erred in giving the following instructions to the Jury which were excepted to by the Plaintiff and exceptions were allowed by the Court.

‘(IV) That all times before such earnings of said boat and barge paid off the cost of building, equipping and operating the same, the Plaintiff, Hager, was to be the owner of said boat and barge.’

‘(II) The Defendant, Gordon, claims that his agreement with the Plaintiff, Hager, in the latter part of 1944 was as follows, to-wit:

(a) That he, Gordon, was to build the boat and barge afterwards known as “Elaine G”;

(b) That said Hager would operate said boat and barge, “Elaine G”, and apply the earnings thereof to the repayment of the cost of building, equipping and operating said boat and barge;

(c) That when the earnings from said boat and barge paid off the cost of building, equipping and operating said boat and barge he, Gordon, would give him, Hager, a title to said boat and barge;

(d) That the earnings from said “Elaine G” boat and barge had not, on or before the 20th day of April, 1946, paid off the cost of building, equipping and operating said boat and barge;

(e) That he, Gordon, never executed any title transferring said "Elaine G" boat and barge to said Hager, or anyone else.

You are instructed that you should consider the above claims of the Defendant, Gordon, at the same time that you consider the claims of the Plaintiff, Hager, mentioned in Instruction Number I, and give effect to such claims as you believe to be true.

(III) (a) You are instructed that this is an action in claim and delivery, which can be maintained by the Plaintiff, Hager, only in case he was the owner of the "Elaine G" boat and barge upon the 20th day of April, 1946, and thereafter. If the owner of said boat and barge, upon the 20th day of April, 1946, was the Defendant, Gordon, then the Plaintiff cannot prevail in this action, and this is true without regard to whether or not the earnings of said "Elaine G" boat and barge had paid off the cost of building, equipping and operating said boat and barge.

(b) You are further instructed that unless the Plaintiff, Hager, proves by a preponderance of the evidence in this case that he, Hager, and not the defendant, Gordon, was the owner of said "Elaine G" boat and barge upon the 20th day of April, 1946, you should find against the Plaintiff, Hager, and in favor of the defendant, Gordon.

(c) You are instructed that if you believe from the evidence Defendant, Gordon, furnished all the

money for the building, equipping and operating (except salary for Plaintiff, Hager) of the boat and barge "Elaine G" prior to April 20, 1946, the title and ownership of said boat and barge would have been in him, Gordon, unless the Plaintiff has proved by a preponderance of the evidence in this case that he and the Defendant agreed, as mentioned in sub-paragraph (4) of Paragraph A of Instruction Number I, to-wit: That at all times before the earnings of said "Elaine G" boat and barge paid off the cost of building, equipping and operating said boat and barge, the said Hager was to be the owner of said boat and barge.' [36]

VI.

That the verdict of the Jury is contrary to the evidence and is contrary to the Law.

VII.

That the verdict is not sustained by any competent evidence: is against the clear weight of the evidence and should be set aside, vacated and a new trial granted.

VIII.

That the verdict as returned into court was arrived at unlawfully, and was arrived at by bias, prejudice and misconduct on the part of certain Jurors and was rendered from sympathy for the said Defendant.

IX.

That the Jury in arriving at the verdict took

into consideration the income tax matter, which was excluded by the court, which prevented a fair and impartial verdict.

Plaintiff Therefore, prays the Court to grant a new trial in said cause, and to do justice between the parties regardless of the purported verdict rendered.

JULIEN A. HURLEY,
BAILEY E. BELL,
Attorneys for Plaintiff.”

II.

The Court erred in overruling the Plaintiff's second motion for a new trial filed after the court rendered judgment for \$5,000.00 attorney's fees against the Plaintiff, which motion was overruled on March 29, 1948, “No. 5628.

MOTION FOR A NEW TRIAL

Comes now the above-named plaintiff, Warren L. Hager, and moves the Court to grant a new trial in the above-entitled cause, and for grounds of this motion, states: [37]

I.

That by the rules of the Judge of this Court it is necessary to file a motion for a new trial within five (5) days from the return and filing of a verdict by a jury.

On January 28, 1948, a verdict was rendered in

the above-entitled cause; on January 31, 1948, a motion for a new trial was filed by the plaintiff, which was argued on February 6, 1948; denied February 13, 1948, and then the Judge of this Court went to the Continental United States and did not return to the bench until March 22, 1948; on March 22, 1948, the judge of this court rendered his judgment in this cause in favor of the defendant, and rendered additional judgment granting the defendant judgment against the plaintiff for five thousand (\$5,000.00) dollars as an attorney's fee in said case.

II.

This plaintiff now moves the Court to set aside, vacate and hold for naught the judgment rendered herein on the 22nd day of March, 1948, in its entirety for all of the reasons heretofore in his motion for a new trial filed in this Court on the 31st day of January, 1948, and hereby makes his motion for a new trial a part of this motion for a new trial as fully as if set out herein in full.

III.

Plaintiff specifically moves the Court to set aside, vacate and hold for naught the judgment rendered on the 22nd day of March, 1948, granting the defendant a judgment for an attorney's fee against the plaintiff in the sum of \$5,000.00, and as grounds therefore, states: That said judgment was not within the power of the court to grant.

That it was granted without any evidence being

provided by any person, and without any evidence having been produced to the Court as to the reasonableness of said fee, and the same is excessive, oppressive and unreasonable, and that the Honorable Warren A. Taylor, who is the Attorney for the defendant, was only engaged in one way in the trial of this case or in the preparation of the pleadings to the extent of three (3) days. [38]

IV.

For the further reason that the amendment to the Alaska Statutes purporting to authorize the granting of judgment to the prevailing party was not in force and effect at the time this suit was filed and the controversy arose, which caused the litigation.

That the amendment to Chapter 58 of the Session Laws of Alaska, 1937, is void and not having been properly passed and approved as the law required and is unconstitutional and void.

Wherefore, plaintiff prays the court to grant a new trial, and to set aside each of the judgments herein rendered on the 22nd day of March, 1948; one of which denied the plaintiff any right of recovery, and the other granted the defendant a judgment for \$5,000.00 for an attorney's fee against the plaintiff, and for such other and further relief as is just and equitable in the premises.

BAILEY E. BELL,
JULIEN A. HURLEY,
Attorneys for Plaintiff."

III.

The Court erred in not instructing the jury to return a verdict for the Plaintiff at the close of all of the evidence as requested by the Plaintiff and denied by the Court.

IV.

The Court erred in sustaining Defendant's objections as follows:

"Q. Mr. Gordon, will you look in there and get the manifests—all of the manifests?

Mr. Taylor: Just a moment. A point of information. Is Mr. Bell referring to the manifests of the "Elaine G"?

Mr. Bell: Both the manifests of the "Elaine G" and the "Bonnie G".

Mr. Taylor: We object to the manifests of the "Bonnie G", as the earnings of that boat are not in controversy here, your Honor.

The Court: Objection sustained.

Mr. Bell: Exception." [39]

V.

That the Court erred in rendering the judgment that it did render on March 2, 1948, denying Plaintiff any recovery and taxing all of the costs of said case against the Plaintiff.

VI.

The Court erred in rendering a judgment in favor of the Defendant and against the Plaintiff for \$5,000.00 attorney's fees without any evidence

whatsoever having been introduced or even offered to base such judgment on, and that said judgment is unauthorized, unjust, excessive, oppressive and beyond the powers of the Court to render, and there is no just reason therefor, and there is no valid statute of the Territory of Alaska and no laws of the United States of America authorizing such judgment.

VII.

The Court erred in sustaining Defendant's objection to competent questions thereby preventing the introduction of competent evidence, all as shown by the court reporter's transcript filed herein and made a part of this assignment of errors as fully as if set out in full.

VIII.

The Court erred in admitting incompetent evidence on the part of the Defendant over the objection of Plaintiff, effecting income tax and failure to pay the same and depreciation matters which brought about a confusion in the mind of the Jury and caused the Jury to render the erroneous judgment that it did render, all as shown by the court reporter's transcript of the record file herein and made a part of this assignment of errors as fully as if set out herein in full.

IX.

The Court erred in refusing to give the Plaintiff's offered instructions as shown in the record.

X.

The Court erred in not instructing the Jury to return a verdict for the Plaintiff for the possession of the boat and barge involved herein at the close of all of the evidence for the reason that the testimony was [40] all *was* to the effect that the "Elaine G" and the barge operated in connection therewith was the property of the Plaintiff and the "Bonnie G" and the barge operated in connection therewith was the property of the Defendant. Both properties were subject to the payment to the Bank of Fairbanks of the chattel mortgage representing the money borrowed to build the "Elaine G", the two large barges and to rebuild the "Bonnie G" and the evidence all shows that when the earnings of the Plaintiff operating the "Elaine G" and his barge, was sufficient to pay the cost of the construction and the cost of operation of the "Elaine G" and the barge operated in connection therewith that said property was his, free and clear of all claims and all of the evidence shows that the earnings of the Plaintiff operating the "Elaine G" and barge was sixteen hundred ninety-seven and twenty-nine one hundredth dollars (\$1697.29) more than the cost of constructing and operating the "Elaine G" and barge and therefore paid the same out in full, and the boat was his and the only question to have been submitted to the Jury was the right of the Plaintiff to recover his damages suffered by the wrongful con-

duct of the Defendant in taking both boats and barges in the year of nineteen hundred and forty-seven (1947) and operating the same without the consent of the Plaintiff who was the real owner of the "Elaine G" and the barge operated in connection therewith.

XI.

The Court erred in not allowing the motion for a new trial when it was so apparent from the record that the verdict was arrived at unlawfully; was based on prejudice and misconduct on the part of certain Jurors; was contrary to law; contrary to the facts; was not supported by any competent evidence, and was against the clear weight of the evidence, and was based upon the incompetent evidence permitted to go before the Jury effecting the income tax and depreciation to take off of the earnings of the boat and barge.

XII.

The Court erred in not taking the case from the Jury and rendering judgment for the Plaintiff on his motion and request at the close of all of the evidence for the reason there was no defense to the Plaintiff's [41] cause of action for the right of possession of his boat and there no defense and no contradictory testimony, and the Plaintiff testified that the use of his boat by the Defendant during the season last past was of the reasonable value of ten thousand dollars (\$10,000.00) and damaged the Plaintiff to that extent and this stands un-

denied either by direct evidence or circumstances and the Court should have rendered judgment for the Plaintiff for the right of possession of his boat and barge and for the uncontradicted and undenied amount of damage so established.

For all of which errors the Plaintiff prays a reversal of the judgment rendered herein and that the United States Circuit Court of Appeals render the judgment in the case that should have been rendered in the Court below and for such other and further relief as the Honorable Circuit Court of Appeals deems just in the premises.

Respectfully submitted,

/s/ WARREN L. HAGER,
Plaintiff.

/s/ JULIAN A. HURLEY,
/s/ BAILEY E. BELL,
Attorneys for Plaintiff.

Service of a copy of the above is hereby acknowledged this 5th day of May, 1948.

/s/ WARREN A. TAYLOR.

[Endorsed]: Filed May 5, 1948. [42]

[Title of District Court and Cause]

PETITION FOR ALLOWANCE OF APPEAL

The above-named Plaintiff, considering himself aggrieved by the judgment of this Court made and

entered herein on the 22nd day of March, 1948, and the order of the Court as set out in the Minutes of the Court and the Assignment of Errors, said judgment being in favor of the Defendant and also the judgment of this Court overruling Plaintiff's motion for a new trial and the final judgment denying Plaintiff any recovery and entering judgment for the Defendant and against the Plaintiff, and for allowing Defendant an attorney's fee, and a judgment for costs.

The Plaintiff having given due notice of appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit Court of the United States setting in San Francisco, California, for all the reasons specified and set forth in the Motion for a New Trial, Assignment of Errors and the Notice of Appeal filed herein does respectfully pray that said appeal may be allowed, and that a transcript of the records, proceedings and papers upon which said judgment was made and entered, be duly authenticated by the Clerk of this Court and sent to the United States Circuit Court of Appeals for the Ninth Circuit of the United States at San Francisco, California, and this said Plaintiff does further pray that said judgment aforementioned be correct, set aside, reversed, a new trial ordered, and a proper judgment entered for the Plaintiff herein, and that the Court fix the amount of appeal bond to be filed herein. [43]

Petitioner further states that he desires to supersede that part of the judgment giving Defendant costs and \$5000.00 attorney's fee and herewith tenders a bond in such amount as the court may require for such purpose and prays that a Supersedeas be allowed as a part of the allowance of said appeal and the amount of the bond fixed so as to operate as a Supersedeas.

Dated at Fairbanks, Alaska, this 30th day of April, 1948.

/s/ JULIEN A. HURLEY and
BAILEY E. BELL,
Attorneys for Plaintiff.

Service of a copy of the above is hereby acknowledged this 5th day of May, 1948.

/s/ WARREN A. TAYLOR,
Attorney for Defendant.

[Endorsed]: Filed May 5, 1948. [44]

[Title of District Court and Cause]

STIPULATION

It is hereby stipulated by and between Warren L. Hager, Plaintiff, and his attorneys of record, Bailey E. Bell and Julien A. Hurley, and Clyde E. Gordon, Defendant, and his attorney of record, Warren A. Taylor, that in printing the record on Appeal in the United States Circuit Court of Appeals for the Ninth Circuit, the title of the Court

and cause shall be printed on the first page of said record and that thereafter it be omitted, and in its place the words, "Title of Court and Cause," may be inserted and that all endorsements on said papers may be omitted except the Clerk's filing, marks and admissions of service.

It is further stipulated that the Court may make an order to the Clerk to send all of the original exhibits and identifications up, as a part of the record and transcript on Appeal instead of copies thereof.

Executed at Fairbanks, Alaska, this 30th day of April, 1948.

WARREN L. HAGER,
Plaintiff,

By BAILEY E. BELL,
Of Attorneys for Plaintiff.

CLYDE E. GORDON,
Defendant,

By WARREN A. TAYLOR,
Attorney for Defendant.

[Endorsed]: Filed May 5, 1948. [45]

[Title of District Court and Cause]

ORDER ALLOWING APPEAL AND FIXING
AMOUNT OF BOND

Now on the 6th day of May, 1948, the same being one of the days of the April, 1948, Term of this

Court, this Cause came on regularly to be heard upon the petition of the Plaintiff herein for the allowance of appeal in behalf of said Plaintiff from the final judgment entered in said cause on the 22nd day of March, 1948, and from the judgment of the Court overruling the motion for a new trial, and also for fixing the amount of appeal bond on said appeal, and the place of hearing said appeal, and said Court being fully advised in the premises.

Does Hereby Find that the amount of appeal bond should be two hundred and fifty dollars (\$250.00).

Does Further Find that the Plaintiff shall be allowed a stay of execution of that part of the judgment giving Defendant costs and five thousand dollars (\$5,000.00) Attorney's fee, pending final determination of this appeal upon his filing in this cause a supersedeas bond in the sum of six thousand dollars (\$6,000.00) which bond is to be approved by the Judge of this Court.

Now Therefore, it is hereby ordered that the appeal of said Plaintiff from the final judgment entered herein on the 22nd day of March, 1948, and the judgment and order of the Court overruling the motion for a new trial, of the motion filed on March 24, and overruled on March 29th, 1948, be and the same is allowed to the United States Circuit Court of Appeals for the Ninth Circuit, and that a certified transcript of the records, proceed-

ings, orders, judgment, testimony, and all other proceedings in said Matter [46] in which said judgment appealed from is based be transferred, duly authenticated, to the United States Circuit Court of Appeals for the Ninth Circuit and therein filed and said cause docketed on or before 90 days from this date to be heard at San Francisco, California, and

It Is Further Ordered that the amount of the appeal bond be, and is hereby fixed at the sum of two hundred and fifty dollars (\$250.00), said bond to be submitted to and approved by the undersigned Judge of this Court.

Done in Fairbanks, Alaska, on the 6th day of May, 1948.

/s/ HARRY E. PRATT,
District Judge.

Service of a copy of the above is hereby acknowledged this 6th day of May, 1948.

/s/ WARREN A. TAYLOR,
Attorney for Defendant.

May 6, 1948.

Entered in Court Journal No. 36, page 253.

[Endorsed] Filed May 6, 1948. [47]

[Title of District Court and Cause]

BILL OF EXCEPTIONS

The Plaintiff respectfully presents the following Bill of Exceptions for allowance and settlement upon the appeal taken from the rulings, orders and judgment of the Court as set forth in this Bill of Exceptions and as set out in the Assignment of Errors and Notice of Appeal filed herein, which will be hereinafter presented in the routine and times of the happenings thereof as near as practicable, the first of which the Plaintiff complains is as follows:

I.

That shortly after the commencement of this trial the Plaintiff called the Defendant to testify and to present the books, records, manifests, receipts, checks and so forth of the operation on the rivers for the freighting season of 1945; and the following proceedings took place: (See page 3 stenographer's transcript.)

“Q. Mr. Gordon, will you look in there and get the manifests—all the manifests?

“Mr. Taylor: Just a moment. A point of information. Is Mr. Bell referring to the manifests of the “Elaine G”?

“Mr. Bell: Both the manifests of the “Elaine G” and the “Bonnie G”.

“Mr. Taylor: We object to the manifests of the “Bonnie G”, as the earnings of that boat are not in controversy here, your Honor

“The Court: Objection sustained.

“Mr. Bell: Exception.

This was an error of the Court which confused the Jury throughout the entire trial and prevented the Plaintiff from making part of his [48] case, that is, to-wit:

He was able to prove the entire earnings of both boats to a definite figure, and then was prevented from proving the earnings of the Defendant with his boat and barge which would have proven unquestionably the earnings of the Plaintiff's boat and barge to have been over \$52,504.75 and the cost of his boat and barge was less than that amount, and by so proving the jury would not have been confused and rendered the unconscionable and unintelligible verdict that they did render.

II.

The Court erred in not instructing the jury at the close of all of the evidence to render a judgment for the Plaintiff for the possession and delivery of the “Elaine G” and the barge operated in connection therewith for the reason that there was no real contradictory evidence introduced on behalf of the Defendant, and all of the evidence on behalf of the Plaintiff established the fact that the boat was the property of the Plaintiff and that the cost of the construction and operation thereof had been fully paid and that the Plaintiff was entitled to the possession thereof at the time this suit was filed, to-wit: May 13, 1947.

All of the material evidence in this case in a narrative form is as follows, to wit:

The first witness called to testify was the Defendant, Clyde E. Gordon. He testified that he lived in Fairbanks, Alaska, was subpoenaed by a subpoena duces tecum to bring all the books and papers of every kind that were used in the equity suit that was dismissed; he testified that he had done so; had brought the manifests of the "Elaine G" and the "Bonnie G", then produced the bills of lading or manifests of both of the boats which were marked for identification; testified that they were the originals and that by using the word bill of lading he meant manifest; he picked out the manifests for the freight handled by the "Elaine G" during the summer of '45 and they were marked Identification Number 1; testified they were the manifests given at the time the boats were loaded, the only ones he had, all signed as originals. (See T. Pp. 6 and 7.) The manifests were then separated, part were marked Identification 2 and were admitted as Exhibit "A". He testified that he had all of the records introduced in the equity case which were left in the custody of the clerk and were later [49] turned back to him, and he took them home and were in the same condition; he is quite positive all of them were there before and that they are all there now; that in receiving the loads at Nenana or Galena they issued a manifest sometimes called bill of lading, and that

is what he identified. Then on cross examination by his attorney, Mr. Taylor, he testified that the bills were changed some before payment, some of the tonnage was changed to cubic tons which made some loads larger and some smaller, but that he received approximately the amount of money as shown on the manifests; then on re-direct, he stated that the records in the box should show the changes but he couldn't find them, but the amount he received was substantially the same as that on the manifests, within a few cents or dollars of it. That he received two checks at the Bank of Fairbanks, one for \$44,297.91 on September 11, 1945, or around that time; another check for \$33,095.52, a total of \$77,393.43 from those two checks; the Alaska Railroad paid an additional \$308.23; and for towing a scow by the "Elaine G" he was paid \$50.00, and \$40.00 a piece for the "Elaine G" and "Bonnie G" for standby time. That the exhibitions included all of the cost of construction and the operation of the "Elaine G", the two scows, and the repair of the "Bonnie G" or rebuilding of the "Bonnie G" and also included the cost of operating of the equipment from the time it left Fairbanks until it was pulled out on the bank, and the exhibitions are all correct as far as he could see. Then Warren L. Hager, the Plaintiff in the case, was called and testified in his own behalf that he was referred to as "Bud" by his friends, had borne that nick name all of his life; he was the

nephew of "Doc" Gordon, the man that had just left the stand; his sister was the mother of the witness. He came to Alaska in compliance with the request of "Doc", met him at Big Delta; came by boat to Valdez, by truck to Big Delta in the spring of '41; found "Doc" Gordon immediately where he was residing at the Reeka Wallen's boarding house; that he was ferrying trucks for the trucking association across the river; that he stayed there; that he went to work for Mr. Gordon as a deck hand, and helped him with ferrying; that he landed in the early part of July, before the fifteenth; came to Fairbanks with "Doc" several weeks later. Discussed the purpose of the trip with "Doc"; the trip was to get some financial support to build a boat. [50] "Doc" wanted a partner to put up some money to build an outfit to freight on the river. He procured the help from E. M. Jones, the operator of the Cottage Bar. The lumber was purchased, the machinery ordered; they went back to Reeka Wallen; they took axes and cleared a piece of brush to lay the keel for the boat; from then on they worked building the boat every day; both worked; also Charlie Smelzer and other carpenters, two or three. Charlie Smelzer was a boat builder. They built the "Bonnie G", operated it on the upper Tana to Tanacross, Tetling and Northway; he worked as a deck hand on the boat, stayed there until the fall of the year, that was 1941. Did the same thing in 1942, joined the army in Decem-

ber, 1942. The boat got frozen in the first year 1941; second year it was pulled out at Big Delta; he was in contact with "Doc" Gordon all the time he was in the army; was stationed here; there was an awful freighting boom on the river; there weren't enough boats to handle all the freight there was to haul. He was interested in that line of business; he thought he would like to get into it. He had an agreement worked out with a fellow whereby they were going to get what money they could and build a boat and put it down on the river for freighting down below. He talked it over with Mr. Gordon in the wintertime, and talked to Gordon several times, in the winter of '44 and the spring of '45 at the Nordale Hotel, N. C. Co., Cottage Bar and wherever they chanced to meet; sometimes ten times a day for a week, then maybe two or three times another week, depending on when he could get to town or how busy Mr. Gordon was; that was the main topic of conversation. He said to "Doc": "I would like to go freighting and I have a deal on with another guy to build a boat. We are in the Army. We may not get to operate it, but there is one man that we think could, and he is working for you, and we would like to have him work for us, if you could spare him, and that boat we are building could operate along with you down there on the Yukon River." (See T. Pp. 22.)

The question was asked: "What did 'Doc' say

to that?" "Doc" thought it was a good idea. He said it was fine, to get this boat business, but he said: "Come in with me. I will take you and we will go to the bank and see [51] if we can get the money, and I will go outside and get machinery and we will build the boat here. You can build it while I am out getting machinery, and then you will be in with me down there." He liked the way I operated—the way I worked. He said: "I think you will be good on it. You will have a boat and a barge, and I will have a boat and a barge, and after this money is all paid—' we was going to make a lot of money; he said, 'I am going to sit back and take it easy and you can take both boats. What money you make with your boat and barge will go into paying it off, and as soon as it is paid off, it becomes yours, free and clear.' " (See T. Pp. 22 and 23.)

He went into details about the boat he wanted to build; they spent several days together in the Northdale Hotel, drawing plans, conferring with Charlie Smelzer, got everybody's ideas together; wanted it as soon as it possibly could be built, whatever size we thought the money could buy lumber enough for; we worked it out together. The boat was built 46 feet long. We agreed on power barges to operate with the boats.

"Now, tell us about the power barge you agreed on?

"We agreed on a boat and a barge for myself,

and he said as long as we were building that, 'I need another barge.' He had a small barge, but he said, 'I need another one. You can build one for me, the same size you are going to have.' That will make two barges and one boat we were to build.

"Did you draw any plans between you, on them? We drew sketches.

"Did you talk to Charlie about those? All the time.

"Now, then how big were the barges that you were going to build? They would be 20 by 110. Twenty feet wide by one hundred ten feet long.

"Were they to have any power in them? They were to be self-propelled.

"Did you agree on the plans of how you were to build them? We did.

"Now, after you did that, what did you do in the way of raising money to construct these boats? We went to the bank.

"What bank did you go to? Bank of Fairbanks.

"Who did you talk to there? Philip Johnson.

"Was he an officer of the bank at the time? He was.

"Now, what was the arrangements made with the bank with reference to financing the building of these boats? [52]

"The arrangements were—(interrupted).

"Mr. Taylor: Just a moment. I object on the grounds—unless it is stated who the arrangements were made with.

“Mr. Bell: I will do that.

“Was ‘Doc’ Gordon present when the arrangements were made? He was.

“Who else was present besides that? Philip Johnson and myself.

“Where was that had, and the arrangements made? At the little private desk of Philip Johnson’s at the bank.

“At that time, it was in the back part of the bank, was it not. That is right.

“Now, then, tell us what the conversation was, and what arrangements were made for financing them? ‘Doc’ outlined all the freighting there was to be done on the river. He had Army verifications. It was common knowledge they had Army Transportation officers here organizing people to build boats, to help the government haul that freight. They needed it. The only way they could get it was by boat. Mr. Gordon made arrangements to mortgage the “Bonnie G” and I believe his little barge that he had then, and a mortgage on the boats and barges that were to be built.

“Now, then, after that arrangement was made, what did ‘Doc’ Gordon do? ‘Doc’ Gordon went Outside. He made arrangements for me to draw on the money to start the building. He ordered the lumber. ‘Doc’ Gordon left for the Outside to get machinery. Machinery was very hard to get then. You had to go after it personally, Outside.

“And ‘Doc’ went out? ‘Doc’ went Outside.

“Do you know about what time of the year it was when he went out? I believe it was in November. The early part of November.

“Now, then, what was done, later, about a place to build the boats? Well, I had to get a place to build the boat, so I tried to lease property along the waterfront. I couldn’t. I finally leased that children’s playground from the City.

“Who did you negotiate with for the leasing of that playground? Mrs. Sylvia Ringstad was the chairman of the Playground Committee, and she had the say, evidently, of what was to be done to that piece of land. [53]

“Was that lease later reduced to writing? It was.

“It was signed by you? It was.

“Then did you take over the section down there and start your work. I did.

“What did you do about a place to work? I went to the bank and drew nearly \$2,000.00 and went to Morris Knudsen, bought two quonset huts for \$800.00 apiece, bought a Ford pick-up to run around in, hired a cat, moved the quonset hut down on—cleared the snow and debris off and set the quonset up for a winter workshop and started to work.

“What was started inside of that quonset hut? It was the keel; the ribs were prefabricated. We built them all winter long, so they would be all

ready to put together as soon as the snow went off in the spring.

“Did Charlie come there and take part in the operations?

“Charlie was right there all the time.

“Bud, were you transferred from the regular duties at the Army base, to that particular enterprise? I was.

“Now, then, when springtime came, or the weather was so that you could work outside, what did you do? We immediately started putting them together; hired a big crew of carpenters and started assembling all the ribs to make the boats and barges.

“Did you work steadily? I worked in all my spare time.

“You had some duties that you had to give to the Army at that time, didnt you? I did.

“And between the Army and the work down there, about how many hours a day did you work from the time you started, until the boats went in the water? Oh, I averaged about 12 hours a day at least.

“Now, when did you next see ‘Doc’ Gordon, after that?

“When he came back from Outside, in the spring.” (See T. Pp 24/28.)

After they were built they were put in the water, moved below the bridge where “Doc’s” “Bonnie

G'' boat was at the time. It was pulled out of the water by Samson's Hardware, below the bridge.

The "Elaine G" could not go under the bridge with the pilot house on top and that had to be put on below the bridge; it was cut out and put on [54] below the bridge; it was four by eight and a half feet. The barges went under as they were. The "Elaine G" boat was powered by a 165 horsepower Gray-Marine Diesel, two cycle diesel, one engine and one engine in each of the barges. The engine was changed from the "Bonnie G" into his barge, and a new 165 horsepower Gray-Marine Diesel, two cycle diesel engine put in the "Bonnie G" and the "Bonnie G" engine was put in Doc's barge, the same size and kind of power was in each boat, the "Elaine G" and the "Bonnie G".

When they were finished we went down the river freighting. We had a small load to Manley Hot Springs. "We left Sunday afternoon, the 4th of July. "Doc" took off in the lead, down the slough, and I with my boat and barge, I followed him down the river. From there we went right on down to Nenana.

"Now, when you got to Nenana, did you load up with government equipment; government property? Not immediately.

"Now tell us what you did there at Nenana? At Nenana we saw the officer in charge of all the freighting. He said he had one big load to go down the river, but there was very little freight

to go down. It would be all coming back up. He said the next—maybe in—‘what I have got here,’ he said ‘maybe tomorrow you can haul it down the river. I am waiting for word’.” (See T. Pp. 30.)

We had been there better than half a day when he came down and said he had word they wanted the freight immediately. He said “go over and start loading.” He took his boat and barge the “Elaine G” to the loading crane and started loading; the “Bonnie G” was tied alongside, waiting to load.

He testified he had a pretty good load, as much as he wanted to take for the initial trip down the river. He checked out the manifest issued for that load; the War Department Contract Number of the manifest was 7,500-TC-A92. (See T. Pp 31.)

The Gordon Transportation Co. received \$1,885.41 for that load.

When he got to Galena he took on another load coming back.

He further testified that during the recess he and the Court Clerk sorted out the slips, “manifests” in routine as to dates and trips. The first [55] one was dated 7/19/45, that would be July 19, 1945, it was P.X. supplies; the amount of the earnings on that load was \$1,885.41.

The next manifest is dated July 19, 1945 and was shipped from Galena to Nenana and the amount received for the load was \$8,878.50; that

was the trip up the river. He hauled that with his "Elaine G" boat and barge.

The next manifest identified was dated August 1, 1945; the earnings on the trip were \$12,143.70.

He didn't haul any cargo back down the river; unloaded at Nenana and went back for more freight.

The next manifest is dated August 16, 1945. He hauled a load back from Nenana to Galena; it was lumber, and the charges as paid by the government was \$2,400.00. He delivered that load himself, the same as the other loads referred to.

Manifest covering his next trip was dated August 19, 1945, was from Galena to Nenana and the government paid them \$3,198.00 for that load. This load was divided into two manifests. Another manifest issued on the same load was for 430 barrels of asphalt and 308 empty drums for which they received \$6,088.50.

The manifest showing the next load hauled by him was dated September 8, 1945 from Galena to Nenana; it was general cargo and they received for this load \$7,564.80.

The next load hauled by him was from Galena to Nenana, the manifest being dated September 24th, was general cargo and they received \$9,987.61 for the load.

That was all of the manifests showing the earnings of the Plaintiff with his boat and barge insofar as the government was concerned.

He testified further that he was the master of the boat, that he always signed for the cargo as such; that Doc always signed for his boat loads and the Plaintiff always signed for his own; that Doc received manifests for his loads that were there in the box of exhibits.

That he and Doc had an agreement that the cost above the bridge for the construction of the "Elaine G" and the two large power barges would be divided—two-thirds to the Plaintiff and one-third charged against Doc. [56] This was agreed before the boats were finished. That his boat was 64 feet long and each of the power barges were 110 feet long. This agreement was had there on the grounds where the barges and boat were being built. It was awful hard to keep the exact costs separated, and I quote from the witness' words on page 38 of the transcript.

"I said 'Doc', it is going to be awful hard to keep the cost of this barge and your barge and my boat all separated," and we looked at them and looked at the size, and figured the labor, and the material that would go into them, and just as Mr. Gordon, himself, stated, we had to go an estimate that was agreeable to us, and we came to our conclusion that the more delicate work went on the boat would just about compensate for the extra material that went into the barge, and we figured the cost of that operation above the bridge should be divided up, two-thirds of the cost was to be charged to me,

and one-third to be charged to him, as we had three projects under construction at the same time."

That "Doc" Gordon removed his engine from the "Bonnie G" and put it in his power barge, then took one of the three new Gray-Diesels and put it in his boat the "Bonnie G."

He then testified that while work was being done below the bridge it was easy to keep track of the cost; they knew which men were working on which outfit and what material was going into each outfit, and that was easily determined by the paid bills.

It was agreed that the help and the supplies used, including oil and food and everything being a cost to operate the outfits, would be charged *charged* against each boat, and everything used on the "Elaine G" his boat would be paid out of the earnings of that boat, and whoever he hired to work on it would be paid from the earnings. That agreement took effect from the time they passed under the bridge at Fairbanks.

"Doc" rebuilt the pilot house on his boat below the bridge.

The witness put the pilot house on the "Elaine G" below the bridge; a superstructure—a cabin, pilot house was all torn down and rebuilt; the plywood was old, needed replacing. The old engine was taken out, new tail shaft bearings were laid, keel was laid for bearings, the new engine was put in, all housed in; the galley was changed

around; just a general remodeling; [57] a paddle wheel was changed; new equipment all went into the "Bonnie G"; he changed the drive from an automobile rear-end drive to a sprocket drive, the two machineries identical with the exception of a little variation in size of the "Elaine G". The "Bonnie G" was a little shorter than the "Elaine G" but powered equally as high. The "Elaine G" was two feet wider than the "Bonnie G"; they drew about the same amount of water.

The cost of rebuilding the "Bonnie G" was to be charged to "Doc"; the additional work on my boat and barge which was done below the bridge was kept separately and charged to me.

After the equity suit was dismissed, the exhibits were kept for quite a long time in the Court Clerk's office. During that time the witness employed a man by the name of Thomas B. Wright, an experienced bookkeeper to go over all of the exhibits and figure out the cost of the "Elaine G" and the barge, and the earnings derived from the "Elaine G" and barge based upon all of the receipts and bills including the cancelled checks for the cost of building and operating the whole enterprise. He then identified the statement made by the bookkeeper. He worked with Mr. Thomas B. Wright in making out the statement in the Court Clerk's office. He was familiar with the purchasing of all of the material and the using of the labor; that the statements on the yellow sheets are

correct; they show the cost of his equipment separate from the cost of "Doc's" equipment.

Capitulation sheet was prepared by Thomas B. Wright showing all of the figures up to the time that they quit operating that fall; that was marked identification number "4". All of the figures are of Thomas B. Wright and they are correct.

The capitulation shows the cost of each of the barges, each fellow's equipment, the cost of operating the boat and barge and the proceeds derived from the hauling from each boat and barge. The capitulation was made from all of the exhibits furnished by "Doc" Gordon, and all cancelled checks, receipts and bills were put in it. [58]

These exhibits were in Mr. Hall's office at the time. All debts at the bank were paid by government checks. There were two checks from the government, one for \$44,297.91, the other for \$33,095.52. They were turned over to the Bank of Fairbanks to liquidate all indebtedness against the boats. Some part of it was to go to "Doc" Gordon's personal account. They were received for hauling of the two boats. "Doc" received other checks as follows: One for \$308.23; one for \$50.00; one for \$80.00. They were all used by the bank in cleaning up the indebtedness. The \$308.23 was earned with the witness' boat; \$50.00 was earned with his boat, and half of the stand-by time of \$80.00 was earned with his boat. That the two identifications made by Mr. Wright show every

charge and credit in connection with building, maintaining, operating and even beaching of boats and putting them away for the winter. Each item was taken from the exhibit that "Doc" Gordon furnished here, everyone without an exception. The building, operation and beaching of his boat and barge amounted to a little over \$50,000.00, a few cents over. He earned more than \$52,000.00 with his boat and barge that year which all went to the bank to repay the cost. The manifests from the government show that the earnings of the "Elaine G" and barge amounted to \$52,504.75; that he hauled each and every particle of that freight and earned that money, and the government paid therefor. That the earnings of his boat and barge exceeded the cost of the construction, operation, maintenance and beaching of it that fall, to the extent of nearly \$2,000.00. That it cost much more for "Doc" to operate his boat and barge due to the fact that the witness had a crew of three on his boat the whole season, and "Doc" had as high as seven, all paid employees, and each furnished food for their employees; it cost more to feed seven than it did three, and "Doc" got on more sand bars; that the proceeds from the earnings of his boat overpaid the cost of building, construction operation and beaching, nearly \$2,000.00.

When the season was over ways were built down by the C.A.A. tower to pull them out of the water, away from the ice, for the winter. We towed them out of the water. The witness saw to it that his

boat and barge were pulled out, and that "Doc's" boat and barge were pulled out, and allowed half [59] of the cost of pulling them out and charged that into the cost of operation of his boat. They lived on the boat thereafter for some time, then on account of fire insurance, he had to get off. No one was permitted to live on the boats in the winter.

The quonset hut he purchased is still in the possession of "Doc" on the Chena River about seven miles below town.

He never heard any dispute over the ownership of the "Elaine G" and the barge until about two days after he had the boats all pulled out of the water and put away for the winter. This happened when he asked "Doc" Gordon when he could get the bookkeeper to get together and have a settling up and divide the profits, if any there were, and divide the equipment as per the agreement, and "Doc" put him off, said the bookkeeper was so busy, he couldn't get around to it, promised to get around to it in a few days. This was repeated at least fifteen or twenty times right in Fairbanks and when he finally filed suit in equity which was later dismissed.

Next summer Gordon took both of the boats and hauled freight with them; that he knew the reasonable rental value of the "Elaine G" and barge, during the summer season, and that \$100.00 per day was reasonable therefor. That Gordon used it one hundred days until the freeze up in the fall. That the boat was damaged to the extent of \$10,-

000.00. That the wear and tear of a boat depends a great deal on good luck, skill and that the boat always needs an overhauling every fall; a general scraping, painting, recalking, engines looked at, all the routine—but there are occasions when you punch a hole in them, and you have to pull them out of the water and replace planking. It depends a good deal upon what conditions you run into on the wear and tear of the boat.

He never paid anything for the use of the boat. The witness never drew any salary while he was operating the boats on the river; never drew a nickle; he was drawing a sergeant's salary from the army and used that in helping pay expenses, that was \$60.00 per month. Between working on the boat and maintenance of himself, everything he received was spent. [60] He didn't have a thing in the fall, nothing but his boat and barge. He put in twenty-four hours a day right on the outfit from the time he started hauling until the season was over.

On cross examination by Mr. Taylor, he testified that he came to Alaska in July, 1941, worked for his uncle direct quite some time; received pay for his work then; got some compensation. From July, 1941 to October, 1942, he was not fully compensated for his services. "Doc" was operating, as he says, on short money, and if he didn't need his wages it was all right to let them go. When he wanted some money for clothing, or when he went to town "Doc" would give him twenty-five or fifty dollars, what-

ever he needed to cover it. During the winter "Doc" furnished him spending money and some clothes. He enlisted in the army in December, 1942. He went to 'Doc' and wanted the loan of Charlie; he wanted to build some boats. Another fellow and the witness were going to build a boat and wanted Charlie Smelzer to run it on the river. He talked to "Doc" about the proposition. "Doc" was going to finance it, and the witness was going to build it. He and "Doc" made several trips to the bank. It had to be taken up with Cap Lathrop, and they had to go back several times. The result was that the money was raised. The witness signed the notes. The first two were \$3,000.00 each; "Doc" had around \$2,000.00. We agreed on the size we would like to have it before we went to the bank. We wanted the boat to be 64 feet and the barge 110 feet; that he drew \$2,000.00 out of the first \$3,000.00 note, made papers for leasing a piece of land to get ready for the building. He paid \$575.00 for a Ford pickup that Mr. Gordon still has. He bought two quonset huts at \$800.00 each; he sold one for the same money; put it back in the Gordon Transportation Co. account; set up the other quonset hut as a work shop on the City playgrounds; paid nothing for the lease of the grounds, except agree to put it back in as good condition as it was.

Spent all of his spare time working in his shop and Mr. Smelzer was working in the shop full time. They made bits and drills and other things, and he spent his time getting equipment and helping

him in the shop. Smelzer was drawing a salary; the witness was paying him out of the money borrowed from the bank.

Said the waybills amounted to \$52,500 and some dollars. He took the actual cost of construction from the bills. He figured the operating [61] expenses on the river which included putting out in the water of the boat and barges, the taking them out, the food, the diesel oil, the fuel oil, everything that went into the cost of maintaining and operating the equipment. The wages to the bookkeeper were figured in; insurance was figured.

He signed the notes at the bank. The notes were later paid off. The insurance is shown in the sheets. They don't carry insurance when they are operating on the river; no marine insurance; the only insurance would be fire. The rates for other insurance are higher than aircraft rates.

In answer to a question over the objections of counsel for Plaintiff, the witness testified that he did not know about any income tax being paid for the year's operation.

He testified that the life of the boat would depend entirely on who was running it, and who was taking care of it. If he were taking care of it, the boat would be good for twenty years.

Then he testified that his earnings for the summer with his boat and barge alone, was \$52,504.00 and the cost of operation and construction, everything figured in, was around \$50,000.000, testifying from memory.

He has never been given a Bill of Sale for the boat; he has owned it always. There was no Bill of Sale; it was automatically his; he built it; he didn't know whether it was registered or not; it might have been registered in the name of the Gordon Transportation Co.

That he drew no salary for operating the boats; he drew his pay from the army only; the army furnished him his clothes and medical care. He drew for food and quarters. He got his board on his own boat and in restaurants; he might have received a very small check for operating expenses, he doesn't remember exactly.

He had to come to Fairbanks twice for parts; the expense is included in the sheets showing the operating expenses; the cost would be included in that.

Gordon bought a small boat and motor from R. K. Lavery that they would need running around when they came into town, and Gordon said he would [62] give it to the witness to go fishing, or anything like that, provided the witness would take care of it for him and let him have the use of it when he needed it. He doesn't know where that boat is now; they used it in operations on the river.

When one of the boats is loaded and ready it takes off; the season is short.

On redirect examination by Mr. Bell, he testified, Mr. Gordon has the Ford Pickup; Gordon is living in the quonset hut; he doesn't claim either of them; they were both figured in the cost of construction of the "Elaine G" and the two barges;

“Doc” has them and he never tried to get them; yet he figured two-thirds of the cost of them in the construction of his boat and barge.

Then on recross examination by Mr. Taylor he testified that he was to build this boat, operate it, haul freight with it, and when it had handled enough to pay for it, it was just to be his clear; it was considered his boat all the time. The cost of building and operating it was to be paid off by the witness, and it was up to the witness to run it with as little expense as possible so he could get it paid off quickly; that is why he used a small crew and freighted all he could, to get it paid off while the freight was there to haul.

Then Thomas B. Wright was called and examined by Mr. Hurley, testified he had had thirty-five years of bookkeeping experience; he was employed by Mr. Hager to go through the books, exhibits, accounts and manifests of the Gordon Transportation Co. which were in possession of the Clerk of the District Court; that they took each individual invoice from the N.C. Co. and all the business houses that they did business with, and segregated them under their number and date and the proportion of whatever expense went to one account or the other; and we did the same with manifests and checks. There wasn't a thing that wasn't taken into consideration; there wasn't a thing paid out or taken in that was not in the figures, and they were divided against Mr. Hager and Mr. Gordon. Each individual bill was gone through. Bud

went through them first and designated to the witness what they were for and where they were used. [63]

That the cost of building the "Elaine G" and the two big barges above the bridge were divided, one-third to each. One-third was charged to Gordon and two-thirds charged to Hager. They were moved down below the bridge, the engines were picked out for their respective boats, and charged to them, and the other material was proportioned as Bud saw fit that they were used. They were charged against the boat they were used in. Then he handed Plaintiff's Identification "3" and asked what it was. He testified:

"A. This is a segregation that we made out of the different bills charging them to the different segregations, and repairs and equipment and operation and wages.

"Q. Does that include building costs? A. Yes.

"Q. Everything that was there? A. That is right."

The witness prepared it; he didn't check it, since he had prepared it, except to make a recapitulation of the whole thing. "We have income on the recapitulation where we showed the net profit and loss." Identification "3" shows the cost and expenses; it shows the cost of construction of the boats and their operation and expenses connected therewith; based upon the records in the Clerk's office, at the time we made that up. They were all considered, everything item that was there.

Then Identification "3" was introduced and marked Plaintiff's Exhibit "B".

The witness was then shown identification "4". He testified: It was the summary of the expense items, a recapitulation; it shows the receipts and net profit and net loss for the operation of the boats and barges. The receipts are shown from the manifests which are marked Plaintiff's Exhibit "A"—that shows the amounts; the difference in the cost of the building and operation complete, and the earnings of the "Elaine G" is \$1,697.29, taking the receipts and deducting the cost of building and operating.

The statement was then offered and received without objection as Exhibit "C". [64]

On cross examination by Mr. Taylor, he testified: That he was now a partner with Mr. Hager in the Riverside Bar and the Wonder Bar, no other bars. In segregating the expenses Mr. Hager explained each item. The witness didn't know anything about the construction; some of the bills were marked for a particular boat or barge; he didn't remember whether all of them were or not. The figures were taken directly from the bills.

Then there was considerable effort made to ascertain whether or not they took into consideration the depreciation of the boat, but the Court sustained objections, but the effect came before the jury.

He further testified that there was a profit on the operation of the "Elaine G" and above the

cost and operation and expense. There was a profit on the operation of the "Elaine G" of \$1,697.29.

Then he was asked about income tax and over the objection of Mr. Hurley, the Court required him to answer, that he did not figure any income tax.

Then on redirect examination he testified: That he didn't know Hager at all at that time; he had some business dealings with Hager. He met Mr. Gordon to get a sheet of plywood from him. Mr. Gordon said he could have it and Mr. Hager said he couldn't. "I think that is the only time I met Mr. Hager until he came up and asked me to make an accounting." That was when he got acquainted with Hager; he had never been in business with him then; he went in partnership with him later.

W. L. Hager was recalled and on direct examination by Mr. Bell testified: That he was the Plaintiff and the witness that was on the stand in his own behalf. That he had possession of the boat up until the 20th of April, 1946; "Doc" Gordon had had possession of it since; that he was removed from the boat by force; he had lived on the boat all the time until then; that the value of the boat and barge new, should be around \$55,000.00.

On cross examination, he testified: That he was in possession of the boat as his own; he was living on it ever since it was built; didn't [65] have any papers to show ownership; didn't apply for any; was claiming it all the time as his own. He had

(Testimony of Thomas B. Wright)

an agreement with "Doc" that he was to do certain things; that he certainly did do all of those things.

He learned from the contracting officer that gave them the contract to haul the freight that he had earned over \$52,000.00 with his boat. He knew how much freight he had hauled on every trip. He was the owner of the boat; as soon as it was paid for it was his. If it wasn't paid for in '45, he would continue on in '46 to fulfill the contract. He was the owner of the boat all the time.

To his knowledge there never was a certificate of ownership issued to any one. He believed at that time the customs were not enforced by the customs officer with the red tape and things they were to go through in Juneau, and the way the army wanted the freight down there, they didn't require everyone to live up to the specifications.

He then testified that he ordered consideration materials for the boats; that he didn't get the priorities; that the only person getting the priorities was the man that did the contracting. "Doc" did that. That he was the owner of the boat at all times, subject to paying the expenses of contracting and operation. He knew when he hauled his last load. That he had hauled more than \$52,000 worth of freight; that it is marked on the manifest. He hadn't computed the expenses of building and operating up to that time.

He then testified over objection of counsel—no

(Testimony of Thomas B. Wright)

one had computed the income tax in the matter.
(See T. Pp. 86.)

He then testified: that in October, 1945 he was trying to compute the exact expense of operation and the cost of the "Elaine G" and barge with Mr. Gordon and Mr. Gordon kept putting him off. He knew how much freight he had hauled; how much money he had made; he wanted to know the exact cost but Gordon wouldn't bring his books out. He knew generally the cost of the lumber and all of the cost of machinery, and approximately the labor; knew closely what the cost was. He figured all the machinery and lumber. At that time he arrived at an overpayment of about \$10,000.00. And then again, the witness was forced to answer over objections that the income tax was not taken into consideration. [66]

That the current in the Yukon River is very slow; on the Tanana, pretty swift, and a short part of the operations were on the Tanana.

On redirect examination by Mr. Bell, he testified: that the boat and barge were to be his free and clear of all liability; just as soon as he had earned enough money with it to pay off everything that it took to go into the building and operating, up to the time when it had made enough money. That the boat was his from the start but he had to help in the operation with his boat until the earnings from his boat paid the bank the cost of construction and operation; and when that was

(Testimony of Thomas B. Wright)

fully paid the liens were no longer existing against the boat.

He made a half dozen demands on "Doc" Gordon before the suit was filed; to let him have the books audited; he went into the room where the books were kept; he requested an accounting at least ten or fifteen times; he would not give it to him. He never at any time denied the witness' ownership of the boat; never denied the contract between them; he never disputed the witness' title.

Recross examination on recall by Mr. Taylor: he admitted the title in the witness; he always referred to it as your boat at all times, at any time he ever mentioned it.

The Plaintiff rested; the Defendant moved for a dismissal and judgment which was overruled.

Then the Defendant took the stand and testified in his own behalf as follows: That his name was Clyde E. Gordon, and he resided at Fairbanks; had for twelve years; the last five years he had been in the boating business, before that he was in the trucking business. He was the owner of the Gordon Transportation Co.; had no partners; it is not a corporation. He knew Warren Hager; his nephew. That Warren came to him at Big Delta in the year 1941; that Bud worked with him on the ferry. The truckers association had a ferry at Big Delta to haul their trucks across the river there.

Mr. Hager remained in the territory after the work was completed at Big Delta; Mr. Hager

(Testimony of Clyde E. Gordon)

worked and helped him on the boat; the construction of the new river boat the "Bonnie G"; it was built at Big Delta. He drew [67] a salary at the time; he couldn't work a full day; he was injured, but he paid him the same scale as the other men. He worked all of that season to freeze up, then came into town, and the witness rented an apartment and paid for the room rent and the groceries and all the expenses during the winter.

The following summer Mr. Hager worked for him he paid him wages. He was a deck hand on the "Bonnie G"; he went in the army around Christmas 1942, the second winter. He stayed in the army until '45 or '46; stationed at Ladd Field.

He had another boat the "Elaine G"; it was built in the winter of '44 and in the spring of '45 at the playfield here at Fairbanks. He built it himself. Charlie Smelzer was master carpenter. Hager worked on the boat. He helped me; he was to do the running and buying and the pickup and any errands and so forth.

The witness furnished every dollar that went into the boat. We launched the boat the latter half of June. The boats were not then completed. We took them below the bridge and finished the cabin work.

He had an agreement with Bud as to the ownership of the "Elaine G". He had a contract with the United States Government for the trading on the Yukon-Tanana River; did for three or four

(Testimony of Clyde E. Gordon)

years in the name of the Gordon Transportation Company, C. E. Gordon sole owner.

In 1945 he negotiated with John Lathanan, the Commanding Officer at Nenana. The agreement he had with Mr. Hager regarding the "Elaine G" and a certain powered barge or scow was:

"I was to build the boat, get a release from the Army for him to operate the boat; he would operate it until such a time that it had earned enough money to pay for its construction, its operation and all expenses. That was two boats was to be operated together, so as to save equipment and crew; help one another out when we got in trouble; and when that boat had earned enough—sufficient money to pay itself off, clear, I was all clear, then I would give him a title to the boat and he could go into business for himself, or go into partnership with me, any way he could see fit at that time." (See T. Pp. 101.) [68]

The witness further testified: As soon as the boats were built, they started operating, instead of Hager working with him and helping with the boats, he took right off in a big hurry in order to pay the boat off, instead of being a help to me, as he promised, he was a hindrance and worry.

He then identified his signature on Plaintiff's Exhibit "A". He then testified that a certain bill had not been signed, or gone through officially; all the others were signed by him; this one is not signed; not registered; not marked for the boat or anything else, just made out to the Gordon Trans-

(Testimony of Clyde E. Gordon)

portation Co. The goods might have been carried by the "Bonnie G"; he would have had to sign it to collect the money on it. The amount of the bill was \$6,088.50; it is signed by Bud.

After the freighting season, we brought them here and built a ways and pulled them out together, and put them up for the winter. At the end of the airfield, the C.A.A. city property. He immediately moved in town in the Hotel Nordale. He had a bookkeeper; she went there too. Her name was Jean Craig. We went right to work on the books; it took better than two weeks to compile and divide and dissect the cost, as near as we possibly could. There was no record kept of the cost between the two, because it had never been considered in the first agreement, and we had to divide it up the best we could to show Mr. Hager the boats had not earned what he thought they had. That the money received from the United States had not paid off the boat.

He testified: He had borrowed \$12,000 from the bank. There was no way of telling which expense was for which boat; it was all in the company expense. He had to furnish everything for both boats—groceries and supplies, fuel and everything, and there was no way of keeping track of it. There was still something due the bank after the completion of operating year; he couldn't say exactly how much. [69]

He was then handed paper marked Identification "A" that he described as a foreclosure proceedings in the Bank of Fairbanks against C. E.

(Testimony of Clyde E. Gordon)

Gordon, Cecil Wells, Mrs. Wells and Wells Alaska Motors, and the United States of America.

Plaintiff objected to all of this and the Court overruled the objection.

He referred to a note given November 9, 1946 then the Court sustained an objection.

He testified further: that he made arrangements for two \$3,000 notes to be turned over to him at the time it was needed by him in the construction work while he was outside. The money was to be turned over to him.

He then testified he had \$6,000.00. The money was to be used in building the boats.

He testified that he and Jean Craig, his bookkeeper, prepared a statement.

He testified he didn't know the cost of the "Elaine G" and the power scow.

He then testified that he prepared some records with the assistance of Jean Craig, his bookkeeper; that she was now in Japan on government service.

The boats were put away the first part of November; the ice was starting to run. Hager asked for a title to the boat, he and his brother wanted to take the books and go over them. He couldn't let him have them; the bookkeeper was working on them. He made several demands to see the books; figure how much they made, etc.; he couldn't do it. "The bookkeeper and I was working on them as hard as I could to get them done. She was hired out to the government and wanted to leave."

Before he could get them totalled, he filed suit

(Testimony of Clyde E. Gordon)

for the boat. The first part of November; he didn't remember the date.

He knew in his own mind the cost of the construction and operation, and the amount he had taken; there were no figures computed. He thinks the [70] suit was filed November 25th.

On cross examination by Mr. Bell, he testified that the \$77,800.00 and the amount he received from the railroad company and the stand-by time paid the notes at the bank, but he didn't pay any outside credit on account. He testified that he took \$12,000.00 Outside with him. He went Outside just before Christmas, December 23d or 24th, 1945. He had borrowed \$12,000.00 from the bank on a note dated December 15, 1947; he borrowed that in the fall of '45—December 15, 1945. The original mortgage was paid at that time.

“Q. What did you want to say? You said ‘not fully,’ or ‘not altogether.’ What more did you want to say? A. The bank was partly paid off. The original mortgage was paid and the Outside creditors—I had to borrow \$12,000 to cover my expenses, my liabilities.

“Q. Now, you wanted to buy some more machinery, didn't you, ‘Doc’—some more equipment? A. Yes.”

The \$12,000.00 was all paid out by check here. He borrowed \$6,000.00 first in two \$3,000.00 notes; he didn't have a bank account at any other bank than the Bank of Fairbanks; he had somewhere in

(Testimony of Clyde E. Gordon)

the neighborhood of \$2,000 when he first made the deal with the bank and Bud.

Jonesy and the witness had just settled prior to that time, a year before.

The boat, the "Bonnie G" was mortgaged to the bank for a part of its construction; he didn't remember the amount. He had paid Jonesy out of the earnings of '44. He had cleared up the mortgage on the "Bonnie G" at the Bank of Fairbanks before they started building the "Elaine G" and the barges. He couldn't tell how much he borrowed from the bank. He first borrowed \$6,000.00 then the army went to the bank and gave the bank a certified contract for \$60,000.00 to cover the cost of construction and Mr. Johnson advanced me as we needed it.

After the boats were in the water there was a note and mortgage made for \$37,000.00; that was in July. Everything was cleaned up at the time he started this construction. He thinks he borrowed altogether \$40,000.00 to build the boat and the barges and to rebuild the "Bonnie G"; it totalled somewhere around \$40,000.00. He had borrowed from all over and from individuals, in all over \$40,000.00 to build the boats and the [71] scows. He was financed through the bank by the army guarantee of Major Jones. All of that money went into the construction of the "Elaine G" and the two barges. That did not cover the work on the "Bonnie G" but he had already bought the motors when he was Outside before coming in. He bought

(Testimony of Clyde E. Gordon)

a Gray Diesel, 165 horsepower for the "Bonnie G". They were bought in January, 1945. He couldn't say when the motors were paid for.

Phil Johnson drew a draft on the Bank of Fairbanks during that time to pay for them.

He got back in the latter part of May, he believes; April, he thinks; he doesn't remember the exact date; something like that.

He hauled part of load of asphalt up the river; he doesn't remember when. He did have a manifest for it.

He didn't do business with any other bank from the time he started the construction of his boat until he finished in the fall of the year, 1945. All of his business was through the bank of Fairbanks.

He testified that he agreed with Hager that the cost of construction of the boats and barges should be divided, one-third to each of the boats.

The barges were longer than the boats, but the boats had three decks, more material, practically as much lumber and cost in the construction of the boat as there was in each of the barges.

They agreed to separate the cost of construction three ways—one-third to each boat and barge.

Then a group of papers marked Identification number 5, also marked "Bonnie G" manifests of cargo "Bonnie G" and barge were handed to the witness.

He admitted that he did once identify these as containing all the exhibitions, all of the manifests of the "Bonnie G". Then he testified that he

(Testimony of Clyde E. Gordon)

found the bill; he had overlooked it. It is the first page of August 18, 1945 for 310 barrels of asphalt, and that he hauled that up the river, and admitted that was the load of asphalt that he hauled up the river and that the manifest of the "Bonnie G" showed that load. [72] That the manifest that he wasn't sure about that was marked "Bud" was for a large amount of asphalt was dated July 27th. Dated 8/27/45 and is for 430 barrels of asphalt and 350 (see T. Pp. 136) and admitted they were separate manifests and were for different loads.

Then on redirect examination by Mr. Taylor, the witness testified that that particular bill of lading was not an official bill, it had never been signed by him, that there was no money collected on it that he knows of; it couldn't have been collected unless he signed it; it called for \$6,088.50.

He borrowed \$37,000 from the bank and more from some individuals. He said he borrowed \$3,000 at one time and \$2,000 from another party and borrowed several hundred from different parties a little less than \$6,000.

Then, on recross examination, he testified as follows:

"Q. 'Doc', who did you borrow that \$3,000 and \$2,000 from?

"A. That was a personal matter. I would rather not state.

"Q. You don't want to tell us who you got it from? A. The \$1,000 from Cap Lathrop.

(Testimony of Clyde E. Gordon)

“Q. Now, you said awhile ago—did you give a note for that?

“A. No, just a personal loan.

“Q. And when was that? A. I don’t remember the date.

“Q. Well, what year was it? A. ’45, in the spring, during the construction of the boat.

“Q. And why didn’t you put it with—Cap Lathrop owns the Bank of Fairbanks, doesn’t he? A. Yes.

“Q. And you borrowed this other money from the Bank of Fairbanks. Why didn’t you put that in the records of the bank?

“A. That was a personal matter that didn’t go on record.

“Q. How did you pay that money back? A. From the earnings.

“Q. And did you pay it back by check, or how? A. I believe I paid in cash.

“Q. Where were you when you paid him? A. At his office. [73]

“Q. Where? A. In Cap Lathrop’s office.

“Q. Well, in which one? He has a whole lot of them. A. There is only one that I know of, in the Lathrop building.

“Q. It wasn’t in the bank that you paid him back? A. No.

“Q. And you think you gave that in cash—currency? And what size bills? A. I don’t know.

“Mr. Taylor: Just a moment, ‘Doc.’ I think that is a little bit irrelevant and immaterial.

(Testimony of Clyde E. Gordon)

“The Court: Objection overruled.

“Q. Did you understand? Just read the question, please.

(Whereupon, the Court Reporter read the question.)

“A. I answer that. I didn’t remember.

“Q. Do you remember when you gave it back to him? A. Not the date; no.

“Q. Well, approximately the date? A. It was two or three months afterwards.

“Q. Was that after you were running on the river, or before? A. Yes, we were running on the river.

“Q. Who did you get the cash from? A. Cap Lathrop’s Secretary.

“Q. And then you took the money from her and give it to him? Did you. A. You are talking about when I paid it back to him?

“Q. That is right, we are talking about when you paid it back. A. I paid it to Cap Lathrop, himself. As I told you before, this is a personal matter and I didn’t care to go into detail. I borrowed a thousand dollars and paid it back to him, and the books showed it.

“Q. Did you ever mention that to Mr. Hager? A. Yes.

“Q. When? A. He knew what I got the money, and where I got it.

“Q. Didn’t you put that and include that in the \$37,000 note? A. No. There is no record of that on the note.

(Testimony of Clyde E. Gordon)

“Q. When you—you never did give a note for that at all? A. (Witness shook his head.)

“Q. How long did you have that money? A. Two or three months.

“Q. And was there any evidence of it at all in writing? A. The record of the payments. The amount of money that was paid back to him. [74]

“Q. But you paid that in cash? A. (Witness nodded.)

“Q. Did you take a receipt from Cap Lathrop for it? A. No.

“Q. And when you got the cash, his secretary loaned you the cash. A. No, his secretary didn't.

“Q. Well, you said you got it from the secretary. Whose secretary? A. When I borrowed the money, the secretary give me the check, the money from Cap Lathrop.

“Q. Was it cash or check? A. That I don't remember.

“Q. You don't remember whether it was a thousand dollars in cash or a check? A. I believe it was a check.

“Q. And you don't want to tell us who got the rest of that money you testified here about, from; the other \$4,000? A. I don't. I would rather not.

“Q. Did you give any notes for them? A. Yes, I had notes for them.

“Q. Well, don't you have the notes back? A. Yes.

“Q. Where are they? A. I have them in my—put away.

(Testimony of Clyde E. Gordon)

“Q. And you won’t give us the benefit of seeing those notes or knowing who they were paid to?

A. They are on record in the books. The money was got, and the money was paid, regardless of who it was given to.

“Q. How did you pay that back, ‘Doc’? A. Out of the earnings of the boat.

“Q. Did you pay it by check or cash? A. I believe it was by check. Don’t you have a check for it? A. Yes.

“Q. Where is that check? A. I don’t know, now. It is a long time ago.

“Q. Well, ‘Doc’, would you show us those notes, or those cancelled checks? A. I said I would prefer not to.

“Q. Did you ever tell Bud anything about those extra dealings any way? A. I had no reason to tell him. It wasn’t any of his business. I was financing the boat. He wasn’t financing it.

“Q. Well, ‘Doc’, you said some debts off Outside in Washington, didn’t you, when you went Outside? A. No.

“Q. What? A. I did not. [75]

“Q. You took some money from here when you went Outside, didn’t you? A. Yes sir, to buy new equipment, and I bought it.

“Q. And that was \$10,000, wasn’t it? A. No.

“Q. How much was it, ‘Doc’? A. I don’t know in total how much it was, because I bought equipment from several different places.

(Testimony of Clyde E. Gordon)

“Q. But you took some bank drafts, didn’t you?
A. Some travelers checks; yes.

“Q. And some bank drafts? About \$10,000?
A. No, \$1,000.

“Q. And that is all you took out to buy all that supplies out there? A. I had \$3,000—\$4,000 note at the bank for that purpose, which I drew from the bank after I made the purchases.

“Q. And that was in ’46 or ’45 that you did that?
A. Early spring of ’45.

“Q. Well, now, you are talking about one time and I am talking about another. ‘Doc’, after you settled with the government in the fall, you went Outside, didn’t you, after the big year on the river, you went to Washington, to your family in Washington, didn’t you? A. I went out, yes. I went out, yes. In the fall of ’45.

“Q. Just before Christmas, I believe you stated?
A. Yes.

“Q. Now then, ‘Doc’, you took some money with you on that occasion, didn’t you? A. Two hundred some odd dollars.

“Q. You took \$10,000 from the Bank of Fairbanks, didn’t you? A. No sir.

“Q. And how long were you out on that trip?
A. Practically three months.

“Q. Three months. Did you write checks against the bank here while you were Outside. A. I did.

“Q. And you bought equipment and repairs and machinery while you were Outside that time, too,

(Testimony of Clyde E. Gordon)

didn't you. A. I did.

“Q. And you had that sent up here to Fairbanks somewhere, didn't you? A. Yes sir.

“Q. And how many thousand dollars worth of that equipment did you buy? A. I don't know off-hand. I never subtracted it—never kept track of it that way. [76]

“Q. Well, it was approximately \$10,000, 'Doc'? A. No.

“Q. Well, was it approximately \$5,000? A. There was \$10,000 worth of equipment that come—followed in '46—B Belt Drive for the paddle wheels.

“Q. Was that \$10,000 worth of equipment? A. That was not money taken from here. That was a mortgage for \$10,000 from the Lomen Equipment Company to cover that equipment. That has not been paid.

“Q. Now, you bought that and shipped it to Fairbanks, did you? A. Yes.

“Q. Did you change the boats over in any way with that? A. I installed that new equipment; yes.

“Q. When did you install that equipment? A. In the spring of '46.

“Q. And, 'Doc', do you have money left from the operations—no, I will withdraw that. Just a minute. (pause) 'Doc', what time in '46 did you change any equipment on the 'Elaine G' boat? A. We changed that year at Ruby, during the month of July, I believe.

(Testimony of Clyde E. Gordon)

“Q. 1946? A. Yes.

“Q. And that was the ‘Elaine G’ that you changed that on? A. It was both boats.

“Q. In July, 1946? A. (witness nodded)

“Q. You are sure of that? A. Yes sir.

“Q. Then you did have the ‘Elaine G’ boat and barge in Ruby on the lower Yukon in 1946, then? A. Yes sir.

“Q. And you had the ‘Bonnie G’ down there at that time? A. Yes sir.

“Q. And you were using them in hauling at that time? A. Yes sir.

“Mr. Bell: I think that is all.

Then on redirect examination by Mr. Taylor he claimed that while he had the “Elaine G” and barge which the Plaintiff claims to own during the year 1946 in July thereof, he bought some equipment and changed the equipment on the “Elaine G” which he contends was worth approximately \$5,000. That was in the summer of 1946 when the Plaintiff claims that the Defendant had wrongfully taken his boat and was using it on the lower Yukon. [77]

Then Ray Kohler was called as a witness, testified that his business was accounting, maintaining an office in Fairbanks by the name of Boulet & Kohler. He had been an accountant for five or six years. He knew Mr. Gordon. He did some work for Mr. Gordon, the first was three years ago, some work to determine the cost of construction and operation of two boats that were to deter-

(Testimony of Ray Kohler)

mine whether or not they had been paid for out of operation. He examined some papers prepared by Mr. Gordon that he referred to in his testimony; it is more of a profit and loss sheet than a balance sheet; it is more of an operating statement. The sheet was offered but objections were sustained to its introduction.

The Court explained to counsel that the data upon which Mr. Kohler made his accounting should be in evidence, and each thing explained, and then he could show how it became his final conclusion. (See T. Pp. 153). This was never done.

He made the sheet up about two years ago, maybe February or March. There are also some work sheets; he doesn't recall the exact procedure at present time; he was able to identify a few items. He used the invoices and cancelled checks; he believes all the cancelled checks were listed; they had been checked off and disbursements are on these sheets, and maybe a little re-apportioning of some of the expenses to these figures. He believes they are a recapitulation of all the items shown to the best of his knowledge. And contained invoices from various debtors, merchants, etc. (See T. Pp. 154.)

He further testified that he checked a substantial portion of the bills and invoices; he didn't believe all the invoices covering the checks were there; they worked merely from the cancelled checks that were issued and cleared through the bank. The checks were drawn on the Gordon

(Testimony of Ray Kohler)

Transportation Co. in payment of the cost of operation of these boats and the cost of building it. He is not so sure but what Mr. Gordon signed a few of the earlier checks.

Mr. Hager was taking care of the construction work; had a certain amount of control over that bank account. He prepared identification "C" with the bills of lading and receipts, and it shows the disbursements, the distribution of the expenses; that was done on the basis of the information he had. [78] Identification "C" was offered and objected to, and the objection was sustained.

He allocated certain construction cost by applying one-third and two-thirds to the "Elaine G" and the "Bonnie G", and one-third to the "Elaine G" and two-thirds to the two scows and the "Bonnie G". He had forgotten about that apportionment until his memory was refreshed; it seems that it was brought out at that time; on the basis of Mr. Gordon's instructions, any way, whatever the apportionment was at the time.

The income tax was based on net income as shown by this statement. The theory that was carried on was that had Mr. Gordon been operating only one boat there would have been income from the "Bonnie G". By operating the two boats he had increased the income that was derived from the operation of the "Elaine G", and the difference of the income tax figured on the income tax on the "Bonnie G", and the combined tax, which amounted to \$23,000.00 made a difference of \$15,-

(Testimony of Ray Kohler)

000.00 additional tax. That is the tax allocated against the operation of the "Elaine G" (see T. Pp. 159). And whether or not that is an equitable apportionment that is something else. The total he computed on the total income. That would be \$22,150.00. The income tax that would have been payable on the "Bonnie G" alone would amount to \$763.00, the difference between \$15,716.00 and a few odd cents. This was all for one year's operation, 1945. The income tax has not been paid.

His figures showed an income from the "Elaine G" of \$39,521.91 instead of the amount shown on the manifest of \$52,455.00. (See T. Pp. 161.)

He testified that he apportioned the earnings of these two boats upon the instructions of Mr. Gordon. Some of the way bills he had never seen until they were introduced in Court here. As he remembered, practically all of the income went to the bank.

Then he testified those way bills were not available to me at the time he made the statement. He then produced some papers that he said were invoices or freight bills. United States Army Transportation Service, addressed to the Gordon Transportation Company. [79]

They were never introduced in evidence and Mr. Kohler was excused as a witness. (See T. Pp. 165 and 166.)

Then Charles A. Smelzer was called. He testified he had lived in Fairbanks for approximately eight or nine years; had been a carpenter most of

(Testimony of Charles A. Smelzer)

the time; knew "Doc" Gordon for about eight years here in Fairbanks and on the boats. His attention was called to 1944. He said he knew "Doc" at the time; worked for him some; he was pilot and engineer on his boat. He was on the boat when it was frozen in up the river. He then went to Seward; came here to Fairbanks. In the fall of 1944 they started work on the "Elaine G" and the two large barges. Mr. Hager paid the first wages, the first month; paid it by check. He doesn't remember the date they started but he worked from then on until the next fourth of July. Then they went off down the river. Mr. Gordon had charge of the work. Hager was there. He gave me orders once in a while how he wanted this fixed or that fixed; that both had the final say, both Gordon and Hager. The boats were launched before the fourth of July.

The witness stayed on the boat, the "Elaine G"; he worked with Hager. Hager was supposed to be the head guy; master of the boat.

The witness stayed on the boat and helped put it up in the fall.

Both Gordon, Hager and himself supervised the putting of the boats away. They were put down by the end of the airfield; he didn't do any work on the boats to speak of after they were put up.

He worked on the boats the following year, on the river, on the "Elaine G". He said Mr. Gordon furnished the money.

On cross examination by Mr. Bell he testified

(Testimony of Charles A. Smelzer)

he didn't know where the money came from. He didn't know how it was raised. He said they were building two barges and a big boat. Both men issued orders to them.

He understood that "Doc" and Bud had some kind of an agreement as to the ownership of the boats; that was what they said themselves. He had heard "Doc" talk about it. He heard "Doc" say in the first place Bud and him had an agreement about building a boat. "Doc" says, "I will build you a boat and give it to you after it is paid for provided you call up with me and help me." (See T. Pp. 172.) [80]

He understood that the "Elaine G" and one barge was to be operated by Bud and the witness; when it was paid for and was clear, it was to be Bud's property provided that everything was carried out.

He testified that he helped build the "Bonnie G". He remembers hauling the asphalt up the river on the "Elaine G" and barge on a trip from Galena up to Nenana.

Everett E. Smith was called by the defense and he testified, that his name was Everett E. Smith; that he was United States Commissioner and Recorder at Fairbanks; has possession of mortgages, bills of sale, and other matters that are for recording or filing. There was a mortgage filed from "Doc" Gordon to the Bank of Fairbanks; he produced it; it is a mortgage for \$12,000, dated Sep-

(Testimony of Everett E. Smith)

tember 15, 1945; it was marked for identification; it has an affidavit of renewal attached to it dated December 15, 1946; it was offered in evidence; the Court sustained an objection to its introduction.

Mr. Smith was excused to be recalled later. The Defendant rested with the reservation to recall Mr. Smith to introduce a certified copy of the mortgage above referred to.

At the time this motion was made out of presents of the Jury,

“Mr. Hurley: If the Court please, at this time the Plaintiff moves the Court for an instructed verdict herein in favor of the Plaintiff and against the Defendant as prayed for in the complaint, for the reason that there has been no evidence on behalf of the Defendant, contradicting the evidence of the Plaintiff as to the contract and as to the money earned, and by the “Elaine G” and the barge, and no evidence contradicting the cost of construction and the cost of operation. The evidence clearly shows that there was \$1600 some odd dollars earned more than the cost, by the Plaintiff, in the operation of the boat, than was expended for the construction of the boat and the barge and the cost of operation.

The Court overruled the motion, and an exception was allowed to Plaintiff. [81]

The Plaintiff, Warren L. Hager was recalled and testified in his own behalf that he is commonly referred to as Bud. He was handed an exhibition

(Testimony of Warren L. Hager)

consisting of manifests that were marked Plaintiff's Exhibit "A" and his attention was called to the manifest whose name written at the bottom is "Bud," and asked to examine it, and to state whether or not he hauled that particular load on the "Elaine G". He answered he did haul that particular load; it consisted of 430 barrels of asphalt, 308 empty drums; he picked up the load at Galena, delivered it to Nenana. He testified that he recognized the hand writing wherever made with a pencil; he recognized the similarity.

He testified further, on those barges we hauled, as Mr. Gordon stated, lots of mixed cargo, and at that time we were getting paid for hauling empty drums back up the river. We were getting a good price for them, and the Army Transportation Service, the officers, would mix up the cargo and sometimes put in two or three of these together and punch them with a clip, showing asphalt, maybe the asphalt would be shipped to Seward, and maybe other things would go to the surplus property. Some would come into Fairbanks. They were made up in duplicate and in triplicate; they would send these out with the load; it was common to have two of these for one load dividing the freight.

The witness further testified that when he and Tommy Wright made up the audit from those tickets in the office of Mr. Hall, the Court Clerk, it was fastened together, exactly as it is now. We didn't write a thing in or put a thing in any way.

(Testimony of Warren L. Hager)

They were pinned together on this desk before they left to go to Mr. Hall's office. He knows that Mr. Gordon testified and picked those out and designated them to be the manifests of the freight hauled by the "Elaine G" and barge.

Then John B. (Dixie) Hall, Court Clerk was called as a witness. He testified that he was the Clerk of the Court; he attended the trial in the matter between Mr. Hager and Mr. Gordon when those exhibits were introduced and they were clipped together by him just like they are now. He never disturbed them in any way; they were sitting in the vault all the time until Warren and Tommy started in on them. They made an audit in the [82] office; he never put anything in there, definitely not. When Mr. Hager and Mr. Hall were there they worked in the little office off the big one. There were only two desks in the outer office and they were in the private office. He didn't stay in there. It could have been inserted without his knowledge; he didn't know whether they did or not. Mr. Hall was excused and left the stand. Recalled and testified he didn't see anything fastened to them in any way, by Tommy Wright or Warren Hager; he knew of no change being made. He was excused.

Thomas B. Wright was recalled in rebuttal testimony for the plaintiff; he testified that he was the same Tommy Wright who had testified before. He further testified that he couldn't remember

(Testimony of Thomas B. Wright)

any of the particular papers but if this paper marked "H" was included in his figured and audit that it was there all the time. He certainly didn't put anything in it or take anything out and didn't change anything in any way.

He was then asked if he was a partner of Hager in the liquor business. He answered, "Certainly I am."

He couldn't remember how they were fastened together or whether or not the clip was taken off at the time. He was then asked on redirect examination by Mr. Bell to add the amount of the manifest. He looked at them and stated he added them yesterday and compared them and they were equal, the same amount as the recap, and this particular one was in the recap when it was added. They checked out exactly to the tab sheets, exactly to a penny.

The next witness called was Mr. Smith the United States Commissioner and the certified copies were produced marked Defendant's Exhibit Number "1" and admitted in evidence.

Both sides rested.

Plaintiff contends that the evidence of the Plaintiff established each and every allegation of his complaint, and that the evidence of the Defendant did not contradict in a substantial way a single allegation in the complaint and therefore the Court should have sustained the motion for an instructed verdict. [83]

THIRD ASSIGNMENT OF ERRORS

The Court further erred in the following proceedings:

“Q. By Mr. Taylor: Now always on this compilation, Mr. Wright, have you figured any income tax on the operating profit of the ‘Elaine G’?”

“Mr. Hurley: We object to that. Incompetent, irrelevant and immaterial. The exhibit speaks for itself. If there was any income tax paid, it is shown in those exhibits—it is in there, according to his evidence, and if they didn’t pay any, it couldn’t be there.”

“The Court: Objection overruled. Exception allowed. A. No, I didn’t.”

This was very prejudicial because whether or not the Plaintiff paid income tax on the earnings from his boat was immaterial, as it made no difference whatsoever to the Defendant. That was a matter between the government and the Plaintiff. The boat was the property of the Plaintiff always, and the Defendant was holding it unlawfully, and this evidence put before the jury, caused the jury to take into consideration, what the income tax would be on the earnings of over \$52,000 by the boat, and of course, by deducting that from the earnings of the boat, the earnings did not equal the cost of production and operation, and this was evidently one of the most colossal errors in the trial of the case, and by a reading of the transcript you will see that this income tax and depreciation of the value of the boat, was constantly asked about by the

defendant's counsel, and was such a grave error as to cause the verdict that was rendered. Because, unquestionably, the agreement was that the Plaintiff was going in with another man and build a boat, and the Defendant "Doc" Gordon urged him not to do it but to go in with him, and that they would borrow the money at the bank, and as soon as the Plaintiff's boat and barge had earned enough to repay the cost of construction and operation, that it was his boat, free and clear of all liabilities. Therefore, income tax was an obligation of the Plaintiff on his own boat, and was not a proper matter for consideration here, at all. Of course, it could be a lien against the boat but that belonged to the United States government until it was paid, and there is no evidence anywhere that it would not have been paid the following year when it became due, if the Plaintiff had received his boat and barge and had not been forcibly held out of possession by the Defendant. [84]

Therefore, injecting two incompetent questions repeatedly into the trial of this case was evidently the reason for the unjust, unintelligible and unreasonable verdict rendered by the jury, when all of the evidence showed that the earnings from the Plaintiff's operating his boat the "Elaine G" and barge, amounted to \$1,697.29 more than the cost of construction and operation of the boat and barge. Therefore, the boat and barge was the property of the Plaintiff, free and clear of all liability or incumbrance to any one, and when the

bank was paid off, and all debts paid against it, there could be no reason why this evidence was competent.

FOURTH ASSIGNMENT OF ERRORS

The Court erred in permitting the Defendant to testify over Plaintiff's objections to money he spent and repairs made on the "Elaine G" in the summer of 1946, when all of the evidence shows he was operating it without the consent and against the will of the Plaintiff, to-wit:

"Q. 'Doc', do you know how much of the money was spent on the 'Elaine G' in 1946?

"Mr. Bell: I object to that for the same reason.

"Mr. Taylor: I asked him if he had knowledge.

"Mr. Bell: In 1946?

"The Court: Objection overruled.

"A. There was close to \$5,000 worth of equipment, besides the labor.

"Mr. Bell: Now, I move to strike that because the contention is here he was wrongfully in possession. We have sued for damages for taking the 'Elaine G' and using it in 1946.

"The Court: Motion overruled. Motion to strike is denied.

"Mr. Bell: And there is no reason for showing that; for showing why he would have to put anything in.

"Mr. Taylor: That is all, 'Doc'."

Mr. Gordon was excused as a witness and left the stand. (See T. Pp. 148.) [85]

FIFTH ASSIGNMENT OF ERROR

Error of the Court in the following proceedings, to-wit:

“The Court: Well, I think it should be shown how he knew how to allocate these sums to the ‘Bonnie G’ and others to the ‘Elaine G’, and also how he computed income tax, and how, in distributing the costs of construction, how—what rule he followed for that, before it is admissible.

“Q. Mr. Kohler, take Plaintiff’s Identification ‘C’. Now, you mentioned that there was a certain allocation of expenses in the construction of the ‘Elaine G’ and the scow. Will you state what that allocation was? A. I believe it was one-third and two-thirds.

“Q. One-third to who? A. One-third to the ‘Elaine G’ and two-thirds to the two scows and the ‘Bonnie B’, but, without refreshing my memory before coming up here, I had forgotten about the apportionment. It seems it was brought out at the time, and it was agreed that was agreeable on that apportionment. On the basis of Mr. Gordon’s instructions, anyway, whatever the apportionment was at the time.

“Q. And would you state how the income tax was carried over?

“Mr. Hurley: We object to the income tax item. No evidence it was ever charged or paid.

“The Court: Objection overruled.

“Mr. Hurley: Save an exception.

“A. The income tax was based on net income as

shown by this statement. I might explain that the reason for this was that—the theory that was carried on was had Mr. Gordon been operating only one boat there would have been income from the ‘Bonnie G’. By operating the two boats, he had increased the income that was derived from the operation of the ‘Elaine G’, and the difference of the income tax figured on the income tax on the ‘Bonnie G’, and the combined tax, which amounted to \$23,000.00 made a difference of \$15,000 additional tax.

“Q. How much? A. \$15,000.

“The Court: That is the tax you allocated to it? A. To the operation of the ‘Elaine G’. [86]

“The Court: To the operation of the ‘Elaine G’? A. Now, whether or not that is an equitable apportionment, that is something else. The total I computed on the total income. That would be \$22,150. The income tax that would have been payable on the ‘Bonnie G’ alone would amount to \$763.00, the difference between \$15,716 and a few odd cents. That, incidentally, has later been substantiated when the Internal Revenue came and . . . (interrupted).

This was prejudicial evidence, and it was incompetent, irrelevant, and immaterial, and Plaintiff contends this was error.

SIXTH ASSIGNMENT OF ERRORS

The Court erred in rendering a judgment in favor of the Defendant and against the Plaintiff

for an attorney's fee of \$5,000 when there was no evidence offered or received, or, before the court, for the purpose of fixing the reasonable value of any attorney's services in connection with the case.

The regular adopted rules for the District Courts for the Territory of Alaska governing us in the trial and appeal of cases so far as the part of the work done, and filed in the Courts here.

Therefore, Rule 35 of the Uniform Rules of the District Court for the Territory of Alaska, effective March 7, 1947, prevail, and Rule 35 and Rule 47 read as follows, to-wit:

Rule 35. Exceptions in Civil Cases.

Whereas the laws of Alaska relative to civil procedure provide:

(a) Section 3636, Compiled Laws of Alaska, 1933: "No exception need be taken or allowed to any decision upon a matter of law when the same is entered in the journal or made wholly upon matters in writing and on file in the court." [87]

(b) Section 3637, Compiled Laws of Alaska, 1933: "The verdict of the jury, any order or decision, partially or finally determining the rights of the parties, or any of them, or affecting the pleadings, or granting or refusing a continuance, or granting or refusing a new trial, or admitting or rejecting the evidence, provided objection be made to its admission or rejection at the time of its offer, or made upon ex parte application or in the absence of a party, are deemed excepted to

without the exception being taken or stated, or entered in the journal.”

It shall not be necessary for counsel to take exceptions in such cases, but, if they so wish, they may, in making up a bill of exceptions for the same, show that the exception was duly taken.

Rule 47. End of Term.

(a) The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of this court to do any act or take any proceedings in any civil or criminal action which has been pending.

(b) Any and all undisposed of matters of any nature, pending in this court at the termination of any term, shall be continued over to the next term, and the situation respecting the same shall in no wise be affected by the termination of any term or terms.

Respectfully submitted.

JULIEN A. HURLEY and
BAILEY E. BELL,
Attorneys for Plaintiff.

Service of a copy of the above is hereby acknowledged this 8th day of May 1948.

.....

Attorney for Defendant. [88]

STIPULATION

It is hereby stipulated that the above Bill of Exceptions is correct and may be allowed, and that a regularly certified transcript of the testimony and proceedings had during the trial of the case, duly certified by Margaret M. Montgomery, official court reporter, may be certified and filed by the Clerk of the Court as a part of the record in this case. And that the same may be referred to by either party for the purpose of briefing, and that the same need not be printed as a part of the transcript of record, and that either attorney may refer thereto and quote therefrom in his brief.

JULIEN A. HURLEY and

BAILEY E. BELL

By B.E.B.

Attorneys for Plaintiff.

WARREN A. TAYLOR

Attorney for Defendant. [89]

CERTIFICATE

The within and foregoing Bill of Exceptions, together with the exhibits herein referred to, is hereby settled and allowed, and is approved and certified as a correct record of the evidence adduced at the trial of this cause and a correct statement of such proceedings, pleadings, rulings and exceptions in said cause during the trial and both prior and subsequent thereto as are deemed necessary by the respective parties to present clearly

the matters for review as to which exceptions are reserved, and as are not included in the primary record herein.

It is further certified that such bill was settled and allowed during the judgment-term or proper extensions thereof, and within the time allowed by the Court for the settlement thereof.

Given under my hand this 8th day of May, 1948.

HARRY E. PRATT

District Judge

[Endorsed]: Filed May 8, 1948. [90]

[Title of District Court and Cause]

APPEAL BOND

Know All Men By These Presents, that we, Warren L. Hager, as principal, and Thomas B. Wright and George Gilbertson, as sureties, are held and firmly bond unto the United States of America in the sum of \$250.00, to be paid to the United States of America; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of May, 1948.

Whereas, lately in the District Court of the United States for the Fourth Division of the Territory of Alaska in a suit depending in said Court between Warren L. Hager, as Plaintiff, and Clyde

E. Gordon as Defendant, a judgment was entered against the said Plaintiff herein, granting to the Defendant herein, Clyde E. Gordon, a judgment against the Plaintiff, denying the Plaintiff any recovery and rendering judgment for costs against him, and said Plaintiff having filed in said Court a Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit at a session of said Court of Appeals to be holden at San Francisco, in the state of California.

Now the conditions of the above obligation is such that if the said Warren L. Hager, shall prosecute said appeal to effect and to pay all costs that may be taxed against him if for any reason the appeal is [91] dismissed, or if the judgment is affirmed, then and in that event the obligation to be void, otherwise to remain in full force and virtue.

Signed, Sealed and Acknowledged this 8th day of May, 1948.

[Seal] /s/ WARREN L. HAGER,
Principal.

[Seal] /s/ THOMAS B. WRIGHT,

[Seal] /s/ GEORGE GILBERTSON,
Sureties.

United States of America,
Fourth Judicial Division,
Territory of Alaska—ss.

Thomas B. Wright and George Gilbertson, be-

ing duly sworn, each for himself, deposes and says:

That he is a freeholder in said District, and is worth the sum of \$500.00, exclusive of property exempt from execution, and over and above all debts and liabilities.

/s/ THOMAS B. WRIGHT

/s/ GEORGE GILBERTSON

Subscribed and sworn to before me this 8th day of May, 1948.

[Seal] /s/ BAILEY E. BELL,

Notary Public in and for the Territory of Alaska.

My commission expires: 1/28/49.

Approved this 10th day of May, 1948.

/s/ HARRY E. PRATT,

District Judge.

[Endorsed]: Filed May 10, 1948. [92]

[Title of District Court and Cause]

SUPERSEDEAS BOND

Know All Men By These Presents, that we, Warren L. Hager, as principal, and Thomas B. Wright and George Gilbertson, as sureties, are held and firmly bound unto the United States of Amer-

ica in the sum of six thousand dollars (\$6,000.00) to be paid to the United States of America; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals this 8th day of May, 1948.

Whereas, lately in the District Court of the United States for the Fourth Division of the Territory of Alaska in a suit depending in said Court between Warren L. Hager, as Plaintiff, and Clyde E. Gordon, as Defendant, a judgment was entered against the said Plaintiff herein, granting to the Defendant herewith, Clyde E. Gordon, a judgment against the Plaintiff for costs and an attorney's fee in the sum of five thousand dollars (\$5,000.00) and denying Plaintiff any recovery. Plaintiff having filed in said Court a Notice of Appeal, and petition praying an appeal, and an order of the Court permitting the filing of a Supersedeas Bond for the purpose of superseding that purpose of judgment which granted to the Defendant his costs and five thousand dollars (\$5,000.00) attorney's fee, and the Court having made an order allowing said appeal, and allowing the Plaintiff to supersede that part of said judgment and fixing the amount of Supersedeas Bond in the sum of six thousand dollars (\$6,000.00) for the purpose of [93] staying an execution on said judgment during the pending of the appeal in the United States Circuit Court

of Appeals for the Ninth Circuit at San Francisco, California.

Now the conditions of the above obligation are such that if the said Warren L. Hager shall prosecute such appeal to effect and pay all costs that may be taxed against him in favor of the Defendant, and to pay the judgment for attorney's fee, if the same is affirmed by said appellate court, or dismissed, then and in that event, the obligation to be void, otherwise to remain in full force and virtue.

Signed, Sealed and Acknowledged this 8th day of May, 1948.

[Seal] /s/ WARREN L. HAGER,
Principal.

[Seal] /s/ THOMAS B. WRIGHT,

[Seal] /s/ GEORGE GILBERTSON,
Sureties.

United States of America,
Fourth Judicial Division,
Territory of Alaska—ss.

Thomas B. Wright and George Gilbertson, being duly sworn and each for himself, deposes and says:

That he is a freeholder in said District, and is worth a sum in excess of six thousand dollars (\$6,000.00), exclusive of property exempt from ex-

ecution, and over and above all of his debts and liabilities.

/s/ THOMAS B. WRIGHT

/s/ GEORGE GILBERTSON

Subscribed and sworn to before me this 8th day of May, 1948.

[Seal] /s/ BAILEY E. BELL,

Notary Public in and for the Territory of Alaska.

My Commission expires: 1/28/49.

The sufficiency of sureties and the bond are O.K. satisfactory.

/s/ WARREN A. TAYLOR,

Attorney for Defendant.

Approved this 10th day of May, 1948.

/s/ HARRY E. PRATT,

District Judge.

[Endorsed]: Filed May 10, 1948. [94]

[Title of District Court and Cause]

CITATION

The President of the United States of America, to
Clyde E. Gordon, Defendant and Appellee, and
Warren A. Taylor, his Attorney of record,
Greetings:

You are Hereby Cited to be and appear in the
United States Circuit Court of Appeals for the
Ninth Circuit, to be holden in the City of San
Francisco, State of California, within forty (40)
days from the date of this Citation, pursuant to an

order allowing an appeal, made and entered in the above-entitled action in which Warren L. Hager is plaintiff and appellant, and the said Clyde E. Gordon is the appellee, to show cause, if any there be, why the judgment rendered in this cause on the 22nd day of March, 1948, and all orders made in said Court in favor of you, the said defendant above named, and against the plaintiff, Warren L. Hager, should not be corrected, set aside, and reversed, and a judgment rendered in favor of the plaintiff, and why speedy justice should not be done to plaintiff and appellant, and defendant and appellee as above named.

Witness the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States of America, and the Honorable Harry E. Pratt, District Judge of this Court.

Attest my hand and the seal of the above-named District Court for the Territory of Alaska, Fourth Judicial Division, on this 10th day of May, 1948.
[Seal] /s/ HARRY E. PRATT,

District Judge.

Service of a copy of the above is hereby acknowledged this 8th day of May, 1948.

/s/ WARREN A. TAYLOR

May 1, 1948.

Entered in Court Journal No. 36, Page 268.

[Title of District Court and Cause]

MARSHAL'S RETURN ON CITATION

I, Stanley J. Nichols, United States Marshal for

the Territory of Alaska, Fourth Judicial Division, do hereby certify and return that I received the hereto attached original Citation in the above entitled action on the 10th day of May, 1948, at Fairbanks, Alaska; and that thereafter on the 11th day of May, 1948, at Fairbanks, Alaska, I duly served the said writ by delivering a copy thereof to Clyde E. Gordon, personally.

Dated at Fairbanks, Alaska, this 11th day of May, 1948.

STANLEY J. NICHOLS,
United States Marshal.

By Clinton B. Stewart,
Deputy.

Marshal's Fees \$3.00.

[Endorsed]: Filed May 11, 1948. [96]

[Title of District Court and Cause]

STIPULATION

It is hereby stipulated by and between the Plaintiff, Warren L. Hager, acting by and through his attorneys, Julien A. Hurley and Bailey E. Bell, and the Defendant, Clyde E. Gordon, acting by and through his attorney, Warren A. Taylor: That in making up the transcript for filing in the Circuit Court of Appeals in this case that the Clerk may attach the original exhibits instead of making

copies thereof, as this would be better for all parties concerned.

WARREN L. HAGER

By /s/ JULIAN A. HURLEY and
BAILEY E. BELL,
Attorneys for Plaintiff.

CLYDE E. GORDON

By /s/ WARREN A. TAYLOR,
Attorney for Defendant.

[Endorsed]: Filed May 8, 1948. [292]

[Title of District Court and Cause]

PRAECIPE FOR TRANSCRIPT OF RECORD

To John B. Hall, Clerk of the above-entitled Court:

You will please prepare transcript of record in the above entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, setting in San Francisco, California, heretofore perfected to said Court and include therein the following papers and records to-wit:

1. Second Amended Complaint.
2. Answer.
3. Reply.
4. Instructions, including Verdicts.
5. Motions for a new trial.

6. Order overruling motion for a new trial.
7. Judgment.
8. First Notice of Appeal, filed March 2, 1948.
9. Motion for a new trial, filed March 24, 1948.
10. Order denying Second Motion for a new trial, filed March 29, 1948.
11. Notice of Appeal, filed April 9, 1948.
12. Assignment of Errors showing Service.
13. Petition for Allowance of Appeal.
14. Stipulation for printing.
15. Order allowing Appeal and Fixing Bond.
16. Bill of Exceptions.
17. Appeal Bond.
18. Supersedeas Bond.
19. Citation on Appeal showing Service.
20. The transcript of the proceedings prepared and certified by Miss Margaret Montgomery, Court Reporter.
21. Stipulation concerning original exhibits.
22. All of the Original Exhibits.
23. Praecipe for Transcript of Record.

This transcript to be prepared as required by the law and the rules and orders of this Court, and of the Circuit Court of Appeals, for the Ninth Circuit Court, and the record is to be forwarded to the Clerk of said Ninth Circuit Court of Appeals of the United States at San Francisco, California, so that it will be docketed therein within the time al-

lowed for filing the same there as shown by the order of the Court allowing appeal and fixing the bond.

Dated at Fairbanks, Alaska, on this 8th day of May, 1948.

/s/ JULIEN A. HURLEY,

/s/ BAILEY E. BELL,

Attorneys for Plaintiff.

Service of a copy of the above is hereby acknowledged this 8th day of May, 1948.

/s/ WARREN A. TAYLOR,

Attorney for Defendant.

[Endorsed]: Filed May 10, 1948. [294]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the District Court for the Fourth Judicial Division, Territory of Alaska, do hereby certify that the foregoing, consisting of 294 pages, constitutes a full, true, and correct transcript of the record on appeal in cause No. 5628, entitled, Warren L. Hager, Plaintiff, versus Clyde E. Gordon, Defendant, and was made pursuant to and in accordance with the Praeceptum of

the Plaintiff and Appellant filed in this action, and is the return thereof in accordance therewith, and

I do further certify that the Index thereof consisting of Page "a" is a correct Index of said Transcript of Record, and that the list of attorneys as shown on Page "b" is a correct list of the attorneys of record; also that the cost of preparing said transcript and this Certificate, amounting to \$34.25, has been paid to me by the appellant in this action.

In Witness Whereof I have hereunto set my hand and affixed the seal of this Court this 14th day of May, 1948.

[Seal] /s/ JOHN B. HALL,

Clerk of the District Court.

[Endorsed]: No. 11934. United States Circuit Court of Appeals for the Ninth Circuit. Warren H. Hager, Appellant, vs. Clyde E. Gordon, Appellee. Transcript of Record. Upon Appeal from the District Court for the Territory of Alaska, Fourth Division.

Filed May 20, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 11,934

IN THE
United States Court of Appeals
For the Ninth Circuit

WARREN L. HAGER,

vs.

CLYDE E. GORDON,

Appellant,

Appellee.

BRIEF FOR APPELLANT.

BAILEY E. BELL,

JULIEN A. HURLEY,

Fairbanks, Alaska,

Attorneys for Appellant.

FILED

SEP 14 1948

PAUL P. O'BRIEN,

CLERK

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No. 11,934

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WARREN L. HAGER,

VS.

CLYDE E. GORDON,

Appellant,

Appellee.

BRIEF FOR APPELLANT.

This action was filed in Fairbanks, Alaska, on May 13, 1947, and various amendments were made and on the 1st day of October, 1947, the second amended complaint was filed. This second amended complaint contained two causes of action; one for a judgment requiring the defendant to return and restore to the plaintiff a certain river boat known as "Elaine G" and a power-driven barge used in connection therewith, or, if the return could not be had, then for judgment for \$25,000.00 the value thereof (T.R. pp. 2, 3 and 4) and contained a second cause of action praying for damages in the sum of \$10,000.00. To this complaint there was an answer filed which denied a good part of the allegations, and contained an affirmative defense in which the defendant claimed to own the boat and barge, and admitted possession

thereof. (T.R. p. 6.) A reply was filed which denied all affirmative matter set forth in the answer and plaintiff prayed to recover as in his original complaint. Judgment was rendered for the defendant, plaintiff appealed and is appellant here. This action was based on the Compiled Laws of Alaska, 1933, generally but especially Chapter LXXX.

It will be noted that Alaska has no statute on replevin, but this is the nearest substitute for replevin and is referred to there as claim and delivery, or recovery of personal property.

There was no bond given in this case and the property was not taken from the defendant, who then had possession thereof.

The right of appeal from the District Court of the Territory of Alaska to this Honorable Court is provided for by Chapter CXIX, Compiled Laws of Alaska, 1933, at page 802.

This appeal was duly perfected and lodged in this Court within the time allowed by law and by the extensions granted by the District Court of the Territory of Alaska.

**“STATEMENT OF POINTS RELIED UPON
FOR REVERSAL.”**

I.

The first point appellant relies upon for reversal are the errors of the Court in the instructions as were set out in two motions for a new trial filed before the Court, and in the notice of appeal; also, the assign-

ment of errors. The overruling of each of the motions for a new trial are assigned as error, and on this our first point relied upon for reversal, we call your attention to the instructions printed in the transcript, commencing on page 10 and extending down to and including page 18.

In our motion for a new trial filed in compliance with a rule of the District Court at Fairbanks on January 31, 1948, three days after the verdict was rendered, we objected to many of the instructions, all of which we had saved exceptions to, and our exceptions were allowed by the Court. (Note T.R. pp. 20, 21, 22.)

In Instruction 1A (see T.R. p. 10), after setting fourth plaintiff's claims in paragraphs 1, 2 and 3, the following requirement was set forth:

"4. That at all times *before such earnings of said boat and barge paid off the cost of building, equipping and operating the same*, the plaintiff, Hager, was to be the owner of said boat and barge." (Emphasis ours.)

Which places too great a burden on the plaintiff, and did not state the law correctly, and this is especially true when it was followed with paragraph "B", which is as follows:

"You are instructed that if the plaintiff, Hager, has proved, by a preponderance of the evidence in this case, each of the matters set forth in subparagraphs (3), (4) and (5) of Paragraph A of this Instruction, then, and only then, should you find in favor of the plaintiff and sign verdict

number I. If the plaintiff fails to prove the matters set forth in any of said sub-paragraphs (3), (4) and (5) above, by a preponderance of the evidence in this case, or if the evidence in this case as to the matters set forth in said sub-paragraphs (3), (4) and (5) is equally divided, you should find against the plaintiff on the issues set forth in this case, and you should find for the defendant, Gordon, and sign verdict number II.

(II) The defendant, Gordon, claims that his agreement with the plaintiff, Hager, in the latter part of 1944 was as follows, to-wit:

(a) That he, Gordon, was to build the boat and barge afterwards known as "Elaine G";

(b) That said Hager would operate said boat and barge, "Elaine G", and apply the earnings thereof to the repayment of the cost of building, equipping and operating said boat and barge;

(c) That when the earnings from said boat and barge paid off the cost of building, equipping and operating said boat and barge, he, Gordon, would give him, *Hager, a title to said boat and barge;*

(d) That the earnings from said "Elaine G" boat and barge had not, on or before the 20th day of April, 1946, paid off the cost of building, equipping and operating said boat and barge;

(e) *That he, Gordon, never executed any title transferring said "Elaine G" boat and barge to said Hager, or anyone else.*

You are instructed that you should consider the above claims of the defendant, Gordon, at the same time that you consider the claims of the

plaintiff, Hager, mentioned in instruction Number I, and give effect to such claims as you believe to be true.

(III) (a) You are instructed that this is an action in claim and delivery, which can be maintained by the plaintiff, Hager, *only in case he was the owner of the "Elaine G" boat and barge upon the 20th day of April, 1946, and thereafter.* If the owner of said boat and barge, upon the 20th day of April, 1946, was the defendant, Gordon, then the plaintiff cannot prevail in this action, *and this is true without regard to whether or not the earnings of said "Elaine G" boat and barge had paid off the cost of building, equipping and operating said boat and barge.*

(b) You are further instructed that unless the plaintiff, Hager, proves by a preponderance of the evidence in this case that he, Hager, and not the defendant, Gordon, *was the owner of said "Elaine G" boat and barge upon the 20th day of April, 1946, you should find against the plaintiff, Hager, and in favor of the defendant, Gordon.*

(c) You are instructed that if you believe from the evidence defendant, Gordon, furnished all the money for the building, equipping and (19) operating (except salary for plaintiff, Hager) of the boat and barge "Elaine G" prior to April 20, 1946, *the title and ownership of said boat and barge would have been in him, Gordon, unless the plaintiff has proved by a preponderance of the evidence in this case that he and the defendant agreed, as mentioned in sub-paragraph (4) of Paragraph A of Instruction Number I, to-wit: That at all times before the earnings of said*

“Elaine G” boat and barge paid off the cost of building, equipping and operating said boat and barge, the said Hager was to be the owner of said boat and barge.” (Emphasis ours.)

You will also note that attached to the instructions as set out commencing on page 10 are two forms of verdict. Verdict number 1 reads as follows:

“We, the jury, duly empaneled and sworn to try the above-entitled case, do, from the evidence and the law of the case, find in favor of the plaintiff, Hager, and against the defendant, Gordon, and that the plaintiff, Hager, was, upon the 20th day of April, 1946, and at all times thereafter, the owner of and entitled to the possession of that certain stern wheel power boat named ‘Elaine G’. and that certain power driven barge named ‘Elaine G’ ”. (Emphasis ours.)

“We further find that the value of said boat and barge, upon the 20th day of April, 1946, was the sum of \$55,000.00, and that the plaintiff has suffered damages in the sum of \$10,000.00 by the taking and withholding of said boat and barge by the defendant.

“Done at Fairbanks, Alaska, this day of January, 1948.

Foreman. (16)’’

There was also attached to the instructions verdict number 2, which were the sole and only verdicts submitted to the jury. Verdict number 2 is as follows:

“We, the jury, duly empaneled and sworn to try the above-entitled cause, do, from the evidence

and the law of the case, find in favor of the defendant, Gordon, and against the plaintiff, Hager, and that upon the 20th day of April, 1946, and thereafter, the defendant, Gordon, was the owner of and entitled to the possession of that certain stern wheel boat named 'Elaine G', *and that certain power driven barge named 'Elaine G'.*

"Done at Fairbanks, Alaska, this 28th day of January, 1948." (Emphasis ours.)

The jury, after a long and tedious deliberation signed and returned verdict number 2. It is appellant's contention that an overwhelming burden was placed on the plaintiff by the erroneous instructions above set forth and in truth and in fact amounted to an instruction to render a judgment for the defendant. In the first place, confining the plaintiff to the 20th day of April, 1946, was an error as the case was tried upon the theory of claim and delivery upon a suit filed long after that time and the pleading upon which the case was tried, the plaintiff's second amended complaint, was filed and entered on October 1, 1947, and the answer thereto was filed October 21, 1947, and the reply was filed December 29, 1947. The second cause of action was based upon the use of the plaintiff's boat for may, June, July, August, September, and October, of 1946, and the instruction was so confusing that the jury could not possibly know what to do in the matter and the forms of verdict submitted to the jury were two in number, one of which was to be used in case the jury found for the defendant. The other compelled the jury to do a lot of things before they could possibly find in favor of the plaintiff on

his first cause of action, which was solely for the return of his boat, if a return thereof could be had, and if a return thereof could not be had, then in the alternative, for a judgment against the defendant for the reasonable market value thereof in the sum of \$25,000.00.

Now, it is quite apparent that the judge would not permit the jury to return a verdict for the return of the boat and barge or a judgment in favor of the plaintiff in the sum of \$25,000.00 as prayed for, but he tacked on to this verdict a mandatory finding which reads:

“We further find that the value of said boat and barge, upon the 20th day of April, 1946, was the sum of \$55,000.00, and that the plaintiff has suffered damages in the sum of \$10,000.00 by the taking and withholding of said boat and barge by the defendant.”

(See T.R. p. 18.)

It is self-apparent that the jury had to find the value of the property to be \$55,000.00 against the plaintiff's allegation and prayed for \$25,000.00, (see T.R. p. 4), and placed the jury in such a position that it could not find for the plaintiff at all without finding the value of the property to be \$55,000.00 and assessing damages against the defendant for \$10,000.00, although the first cause of action asks solely for the return of the property or its value in lieu thereof in the sum of \$25,000.00 and nowhere in the pleading did the plaintiff ask for \$55,000.00 as the reasonable market value of the property. Then he left the jury

with only one thing to do on behalf of the plaintiff and that was to render a judgment not based upon the pleadings as to the value of the property and required it to render a judgment for \$10,000.00 damages or in the alternative to render judgment for the defendant. This puts such an unreasonable burden upon the plaintiff that the jury rather than to sign verdict number 1, apparently signed verdict number 2, doing an extreme and violent injustice to the plaintiff.

This amended complaint consisted of two separate and distinct causes of action and the jury should have been permitted to render judgment for the plaintiff on the first cause of action, if it cared to, and to have rendered judgment on the second cause of action for either the plaintiff or the defendant as it saw fit to do from the pleadings and the evidence, but instead of that the jury either had to find to the utmost for the plaintiff and fix a value of the property at \$55,000.00 instead of \$25,000.00 as alleged in the complaint and as prayed for and to render a judgment for \$10,000.00 damages against the defendant or they could do nothing whatsoever for the plaintiff. There was no alternative and no proper verdicts submitted to the jury and the instructions as above set out are so biased and prejudiced against the plaintiff and so completely against all of the evidence that no jury could be expected to read the instructions as given and render a judgment for the plaintiff. In truth and in fact, these instructions put the jury on the spot where they could only do one thing and that was render judgment for the defendant.

Please note instruction III, page 13, T.R., these words:

“If the owner of said boat and barge, upon the 20th day of April, 1946, was the defendant, Gordon, then the plaintiff cannot prevail in this action, *and this is true without regard to whether or not the earnings of said ‘Elaine G’ boat and barge had paid off the cost of building, equipping and operating said boat and barge.*” (Emphasis ours.)

Then this was followed with subdivision (b) of the instructions, which is as follows:

“(b) You are further instructed that unless the Plaintiff, Hager, proves by a preponderance of the evidence in this case that he, Hager, and not the Defendant, Gordon, was the owner of said ‘Elaine G’ boat and barge upon the 20th day of April, 1946, (10) you should find against the Plaintiff, Hager, and in favor of the defendant, Gordon.”

To support our contention that this instruction was error, we call your attention to the evidence in the case set forth in the Bill of Exceptions commencing on p. 55, T.R. First, the defendant identified two exhibits that were attached by a stapler. One was the manifest of the freight hauled by the plaintiff, Hager, with the “Elaine G” boat and barge. The other were the manifests of freight hauled by the defendant with the “Bonnie G” boat and barge. It should be borne in mind that the defendant himself had the custody of these manifests, picked them out and identified

them himself and then testified that in addition to the amount shown on the manifests that he received \$308.23 paid by the Alaskan Railroad for the towing of a scow by the "Elaine G"; that the "Elaine G" was paid \$50.00 and \$40.00 for standby time and that the exhibits in the box held by him included all of the cost of construction and the operation of the "Elaine G," the two scows and the repairing or rebuilding of the "Bonnie G" and included the cost of operating the equipment from the beginning to the time it was pulled out on the bank of the Chena in the fall after the summer's operation.

Then, Warren L. Hager testified that his mother was the sister of Mr. Gordon, the defendant herein; that he had worked with "Doc" Gordon a long time before he enlisted in the army; that he enlisted in 1942 in December; that while he was serving in the army he was stationed at Fairbanks and there was an awful freighting boom on the river and weren't enough boats to handle all the freight there was to haul. He was interested in that line of business. He thought he would like to get into it. He had an agreement worked out with a fellow whereby they were going to get what money they could and build a boat and put it down on the river for freighting down below. He talked it over with Mr. Goron in the winter-time and talked to Gordon several times in the winter of 1944 and the spring of 1945 at the Nordale Hotel, N. C. Co., Cottage Bar, and wherever they chanced to meet; sometimes ten times a day for a week, then maybe two or three times another week depending on when he

could get to town or how busy Mr. Gordon was; that was the main topic of conversation.

He then testified:

“I said to ‘Doc,’ ‘I would like to go freighting and I have a deal on with another guy to build a boat. We are in the army. We may not get to operate it, but there is one man that we think could and he is working for you and we would like to have him work for us if you could spare him and that boat we are building could operate along with you down there on the Yukon River.’” (P. 60, T.R.)

Then he was asked:

“What did ‘Doc’ say to that?” “Doc” thought it was a good idea. He said it was fine, to get this boat business, but he said: “Come in with me. I will take you and we will go to the bank and see if we can get the money, and I will go outside and get machinery and we will build the boat here. You can build it while I am out getting machinery and then you will be in with me down there.” He liked the way I operated—the way I worked. He said: “I think you will be good on it. *You will have a boat and a barge, and I will have a boat and barge, and after the money is all paid—we are going to make a lot of money.*” He said, “I am going to sit back and take it easy and you can take both boats. *What money you make with your boat and barge will go into paying it off, and as soon as it is paid off, it becomes yours, free and clear.*” (T.R., p. 61; emphasis ours.)

He also testified that they spent several days together in the Nordale Hotel drawing plans, conferring with Charlie Smelzer, got everybody's ideas together; wanted it as soon as it possibly could be built, whatever the money could buy lumber enough for; we worked it out together. The boat was built 46 feet long. We agreed on power barges to operate with the boats. We agreed on a boat and barge for myself and he said as long as we were building that, "I need another barge." He had a small barge but he said, "I need another one. *You can build one for me the same size you are going to have.*" That will make two barges and one boat we were to build. (See T.R., p. 62; emphasis ours.)

Thereafter he was asked:

"Now, after you did that, what did you do in the way of raising money to construct these boats? We went to the bank.

"What bank did you go to? Bank of Fairbanks.

"Who did you talk to there? Philip Johnson.

"Was he an officer of the bank at the time? He was."

Philip Johnson, "Doc", and himself were present. The arrangements were made at the little private desk of Philip Johnson at the bank. "Doc" outlined all the freighting there was to be done on the river. He had army verifications. It was common knowledge, they had Army Transportation Officers here organizing people to build boats, to help the government haul that freight. They needed it. The only way they

could get it was by boat. Mr. Gordon made arrangements to mortgage the "Bonnie G" and I believe his little barge that he had then, *and a mortgage on the boats and barges that were to be built.*

After the arrangements were made "Doc" went outside. He made arrangements for me to draw on the money to start the building. He ordered the lumber. "Doc" Gordon left for the outside to get machinery. Machinery was very hard to get then. You had to go after it personally, outside.

"And 'Doc' went out?" "'Doc' went outside."

That he believed was in November.

The witness then testified that he got a place to build a boat; leased the children's playground from the city. Mrs. Sylvia Ringstad was the chairman of the playground committee. The lease was reduced to writing.

They took over that section down there and started to work. Then he testified in answer to this question:

"What did you do about a place to work? I went to Morris Knudsen, bought two quonset huts for \$800.00 apiece, bought a Ford pick-up to run around in, hired a cat, moved the quonset hut down on—cleared the snow and debris off and set the quonset up for a winter workshop and started to work." (See T.R. p. 64.)

He testified that Mr. Gordon returned in the spring; that the boats had been built and put in the water. They agreed that the cost of the work done above the bridge and the material furnished should be charged

one-third to "Doc" and two-thirds to Hager as Hager was building himself a boat named "Elaine G" and a power barge to operate therewith and that "Doc" was building the same size and kind of a power barge to operate with his boat; that this agreement as to cost allocation was made before the boats were finished; that Mr. Gordon said that we would have to go on an estimation as it was too difficult to figure out the exact cost of my boat and barge as compared with the cost of his barge and that it would be fair to charge one-third of the cost to him and two-thirds of it to the plaintiff, Hager; that each of the boats, the "Bonnie G" and the "Elaine G", were powered by new Gray-Diesel engines and his barge had a new Gray-Diesel engine in it and "Doc's" barge was powered by the transfer of the engine from the "Bonnie G" to the barge. He further testified that when the boat "Elaine G" and the two barges were moved below the river bridge to the spot where the "Bonnie G" was docked, that the work on each of the boats including the rebuilding of the "Bonnie G" would be charged against the particular man for whom the work and material was furnished and that the help used on the boats and the supplies used, including oil, food, and everything as to cost of operation of the outfits would be charged against each boat and everything used on the "Elaine G", his boat, would be paid out of the earnings of that boat and whoever he hired to work on it would be paid from the earnings and this agreement took effect from the time they passed under the bridge at Fairbanks.

That "Doc" rebuilt the pilot house on his boat below the bridge and the witness, Hager, put the pilot house on the "Elaine G" below the bridge; that the old engine was taken out of the "Bonnie G" and placed in "Doc's" power barge. New tail bearings were laid, keel was laid for bearings, the new engine was put in, all housed in; the galley was changed around; just a general remodeling; a paddle wheel was changed; new equipment all went into the "Bonnie G"; he changed the drive from an automobile rear-end drive to a sprocket drive, the two machineries identical with the exception of a little variation in size. The "Bonnie G" was a little shorter than the "Elaine G", but powered equally as high. They drew about the same amount of water.

The cost of rebuilding the "Bonnie G" was to be charged to "Doc". The additional work on my boat and barge which was done below the bridge was kept separately and charged to me.

After the equity suit was dismissed, the exhibits were kept for quite a long time in the Court Clerk's office. During that time the witness employed a man by the name of Thomas B. Wright, an experienced bookkeeper, to go all over the exhibits and figure out the cost of the "Elaine G" and barge based upon all of the receipts and bills, including the cancelled checks for the cost of building and operating the whole enterprise. He then identified the statement made by the bookkeeper. He worked with Mr. Thomas B. Wright in making out the statement in the Court Clerk's office. He was familiar with the purchasing of all of

the material and the using of the labor and that the statements on the yellow sheets are correct. They show the cost of his equipment separate from the cost of "Doc's" equipment.

Capitulation sheet was prepared by Thomas B. Wright showing all of the figures up to the time they quit operating that fall; that was marked Identification No. 4. All of the figures are of Thomas B. Wright and they are correct.

The capitulation shows the cost of each of the barges, each fellow's equipment, the cost of operating the boat and barge and the proceeds derived from the hauling of each boat and barge. The capitulation was made from all of the exhibits furnished by "Doc" Gordon and all cancelled checks, receipts and bills were put in it.

These exhibits were in Mr. Hall's office at the time. All debts at the bank were paid by government checks. There were two checks from the government, one for \$44,297.91, the other for \$33,095.52. They were turned over to the Bank of Fairbanks to liquidate all indebtedness against the boats. Some part of it was to go to "Doc" Gordon's personal account. They were received for hauling of the two boats. "Doc" received other checks as follows: One for \$308.23; one for \$50.00; one for \$80.00. They were all used by the bank in cleaning up the indebtedness. The \$308.23 was earned with the witness' boat; \$50.00 was earned with his boat, and half of the stand-by time of \$80.00 was earned with his boat. That the two identifications

made up by Mr. Wright show every charge and credit in connection with building, maintaining, operating and even beaching of boats and putting them away for the winter. Each item was taken from the exhibit that "Doc" Gordon furnished here, everyone without an exception. The building, operation and beaching of his boat and barge amounted to a little over \$50,000.00, a few cents over. He earned more than \$52,000.00 with his boat and barge that year, which all went to the bank to repay the cost. The manifests from the government show that the earnings of the "Elaine G" and barge amounted to \$52,504.75; that he hauled each and every particle of that freight and earned that money, and the government paid therefor. That the earnings of his boat and barge exceeded the cost of construction, operation, maintenance and beaching of it that fall, to the extent of nearly \$2,000.00. That it cost much more for "Doc" to operate his boat and barge due to the fact that the witness had a crew of three on his boat the whole season, and "Doc" had as high as seven, all paid employees, and each furnished food for their employees; it cost more to feed seven than it did three, and "Doc" got on more sand bars; that the proceeds from the earnings of his boat overpaid the cost of building, construction, operation and beaching nearly \$2,000.00.

That when the season was over ways were built down by the C.A.A. tower to pull them out of the water, away from the ice, for the winter. We towed them out of the water. The witness saw to it that his boat and barge were pulled out and that "Doc's"

boat and barge were pulled out, and allowed half of the cost of pulling them out and charged that into the cost of operation of his boat. He lived on the boat thereafter for sometime, then on account of fire insurance, he had to get off. No one was permitted to live on the boats in the winter. (See pages 65, 66, 67, 68, 69, 70, 71, 72, 73, and 74 of T.R.)

He then testified about the quonset hut that was purchased still being in "Doc's" possession and stated that there never was any dispute about the ownership of his boat and barge until about two days after he had the boats all pulled out of the water and put away for winter. This happened when he asked "Doc" when he could get the bookkeeper to get together and have a settlement and divide the profits if there were any and divide the equipment as per the agreement and testified that "Doc" put him off, said the bookkeeper was so busy he couldn't get around to it, promised to get around to it in a few days. This was repeated at least fifteen or twenty times right in Fairbanks and then he finally filed suit in equity which was later dismissed, and the next summer Gordon took both the boats and hauled freight with them. Then on cross-examination concerning the agreement with "Doc" he testified that he signed the notes at the bank; that the notes were later paid off; that the cost of the insurance was shown in the sheets; that the size of the boat and barges were agreed upon; that two \$3,000.00 notes were made at the bank; that he signed them; that he sold one of the quonset huts for \$800.00 and put

the money back in the bank; that the way bills from his boat and barge amounted to \$52,500.00 and some dollars; that he took the actual cost of construction from the bills. He figured the operating expenses on the river which included putting out in the water of the boat and barges and the taking them out, the food, the diesel oil, the fuel oil, everything that went into the cost of maintaining and operating the equipment. The wages to the bookkeeper were figured in; insurance was figured.

He testified then that his earnings were \$52,504.00 and the cost of operation and construction, everything figured in, was around \$50,000.00; that he had never been given a bill of sale for the boat; he had owned it always. There was no bill of sale; it was automatically his; he built it; he didn't know whether it was registered or not; it might have been registered in the name of the Gordon Transportation Co. That he drew no salary for operating the boats. He was transferred by the army to the boats and drew army clothes and medicine, including his pay. He got his board on his own boat and in restaurants.

Then on redirect examination he testified that Gordon had the Ford Pickup and was living in the quonset hut and that he doesn't claim either of them; they were both figured in the cost of construction of the "Elaine G" and the two barges; "Doc" has them and he never tried to get them; yet he figured two-thirds of the cost of them in the construction of his boat and barge.

Then on recross examination by Mr. Taylor, he testified that he was to build this boat, operate it, haul freight with it and when it had hauled enough to pay for it, it was just to be his clear; it was considered his boat all the time. The cost of building and operating it was to be paid off by the witness and it was up to the witness to run it with as little expense as possible so he could get it paid off quickly; that is why he used a small crew and freighted all he could to get it paid off while the freight was there to haul.

Thomas Wright was then called and identified, the identifications consisting of the capitulation and worksheets, which he said clearly disclosed all of the cost of construction, operation and beaching of the "Elaine G" and the barge operated therewith; identified the figures and papers which were introduced in evidence, which figures showed the cost of construction, operation and beaching to be \$1,697.29, less than the receipts from the hauling by the "Elaine G" and barge. In other words, the earnings of the "Elaine G" and barge were \$1,697.29 more than the cost of all of the construction, operation and beaching.

Then Gordon was called and testified in his own behalf. That he was the owner of the Gordon Transportation Co.; it was not a corporation and he had no partners. That Warren Hager was his nephew; that he had an agreement with Bud (the evidence all shows that Bud is the nickname of Warren L. Hager, the plaintiff herein) as the owner of the "Elaine G". See T.R. p. 86. That he had a contract with the United States Government for trade on the Yukon-

Tanana River; did for three or four years. That the contract and agreement that he had with Hager regarding the "Elaine G" and a certain power barge or scow was:

"I was to build the boat, get a release from the Army for him to operate the boat; he would operate it until such a time that it had earned enough money to pay for its construction, its operation and all expenses. That was two boats was to be operated together, so as to save equipment and crew; help one another out when we got in trouble; and when that boat had earned enough—sufficient money to pay itself off, clear, I was all clear, then I would give him a title to the boat and he could go into business for himself, or go into partnership with me, any way he could see fit at that time." (See T.R. p. 87.)

He testified about the borrowing of the money from the Bank of Fairbanks to build the "Elaine G", the two power barges and to overhauling his boat and testified that he had approximately \$2,000.00 of his own money when they started. He admitted on cross-examination that a mortgage was made to the bank in July of 1945 for \$37,000.00 and that everything was cleared up at that time, but stated that he thought he borrowed altogether \$40,000.00 to build the boat and barges and to rebuild the "Bonnie G". It totalled somewhere around \$40,000.00. He borrowed some from individuals and admitted receiving back \$77,800.00 plus the amount he received from the railroad company and the stand-by time, etc., and he further testified that he agreed with Hager that the

cost of construction of the boats and barges should be divided one-third to each of the boats. The barges were longer than the boats, but the boats had three decks, more material, practically as much lumber and cost in the construction of the boat as there was in each of the barges and that they agreed to separate the cost of construction three ways, one-third to each boat and barge. (See T.R. pp. 90, 91, 92.) That he borrowed \$37,000.00 from the bank; that he borrowed \$3,000.00 at one time and \$2,000.00 from another party and several hundred from different parties, a little less than \$6,000.00.

Then note his testimony of evasion commencing on page 93 and continuing over to page 100, T.R.

Then the defendant, Gordon, called as his witness Charles A. Smelzer. He testified that he was a carpenter, had worked for "Doc" Gordon for several years, lived in Fairbanks approximately eight or nine years; he knew "Doc" in 1944; he had been pilot and engineer on his boat, was on his boat when it was frozen in up the river. He then went to Seward and came to Fairbanks in the fall of 1944. They started work on the "Elaine G" and the two large barges. Mr. Hager paid the first wages the first month; paid it by check. Didn't remember the date they started, but worked until the 4th of July then went off down the river. Mr. Gordon had charge of the work. Hager was there. He gave the witness orders once in a while, how he wanted this or that fixed; that they both had the final say; both Gordon and Hager. The witness

stayed on the boat, the "Elaine G"; he worked with Hager. Hager was supposed to be the head guy, master of the boat. On cross-examination he testified that he didn't know where the money came from. He didn't know how it was raised. He said they were building two barges and a big boat. Both men issued orders to them.

He understood that "Doc" and "Bud" had some kind of an agreement as to the ownership of the boats; that was what they said themselves. He had heard "Doc" talk about it. He heard "Doc" say in the first place Bud and him had an agreement about building a boat. "Doc" says:

"I will build you a boat and give it to you after it is paid for provided you call up with me and help me."

He understood the "Elaine G" and one barge was to be operated by "Bud" and the witness. When it was paid for and clear, it was to be "Bud's" property providing that everything was carried out.

He testified that he helped build the "Bonnie G". He remembers hauling the asphalt up the river on the "Elaine G" and barge on a trip from Galena up to Nenana. (You will note this represents the manifest that "Doc" Gordon later denied after he had first identified it as being one of the manifests hauled by the "Elaine G" and barge operated by "Bud" Hager, the appellant here.)

Therefore, the Court erred in giving the instructions that he did and in submitting the two only

forms of verdict above set forth and, therefore, prevented this plaintiff from having a fair trial and by so doing caused an unconscionable verdict to be rendered, which was directly contrary to all of the evidence of both the plaintiff and the defendant.

SECOND POINT RELIED UPON FOR REVERSAL.

For the purpose of clarity and convenience of the Court and attorneys, we would like to present as our second point for reversal the overruling by the Court of the plaintiff's motion for an instructed verdict at the close of the evidence.

While there is much haggling back and forth in the testimony, there is no dispute about what the agreement was between the plaintiff and the defendant. It all amounts to this, that Hager, the plaintiff herein, was about to go into a deal with another man to build a boat and barge to put into government service for the hauling of freight on the lower Tanana and Yukon Rivers and that he went to his uncle, Clyde E. Gordon, who bears the nickname of "Doc" for the loan of an employee of "Doc" to-wit, Charlie Smelzer, for the purpose of building a boat and barge and that Hager was an experienced man on the river and so was "Doc" and "Doc" liked the way Hager worked and at "Doc's" instance and request Hager gave up his arrangements with the other man and went into the deal with his Uncle "Doc". Everyone agrees that the cost of construction of the "Elaine G" and the two power barges was to be charged one-third against Doc and two-thirds against Hager. They all agree

that Hager was building himself a boat known as the "Elaine G" and a power barge and that Hager was building a power barge for "Doc". Up to this point there is no controversy. The evidence also is identical that the money was to be borrowed from the Bank of Fairbanks, all but \$2,000.00 "Doc" had and "Doc" was going outside to Seattle, Washington, to buy some equipment and "Bud" or the plaintiff, Warren L. Hager, was to start the construction immediately. The evidence is undisputed that the bank did furnish the money up to \$37,000.00. "Doc" claims that he borrowed \$2,000.00 and \$3,000.00 more from other persons and also borrowed a few \$100.00 advancements and that he had \$2,000.00. All of this money could not possibly have exceeded \$44,000.00, basing it upon the testimony of both the plaintiff and the defendant.

The testimony shows conclusively that the defendant, "Doc" Gordon, picked out of his records the manifests for the freight hauled and the money earned by the "Elaine G" and the barge of the plaintiff, Warren L. Hager, and that he built this boat and barge and operated it all the time, signed the manifests as the master of the boat and earned \$52,504.75 for hauling for the government, which was all paid to the bank and also earned \$308.23 from the railroad and \$50.00 for towing a barge and \$40.00, one-half of the \$80.00 stand-by time, making admitted earnings of the plaintiff with his boat and barge to the extent of \$52,802.75, all of which went to the bank to "Doc" Gordon's account or for the special purpose of repaying the cost of building and operating the equip-

ment. The plaintiff tried to prove and the defendant objected and the Court sustained the objection as to the exact earnings of the "Bonnie G" and barge. This would have completely clarified the issue if it had been permitted. However, this is assigned as error and will be considered elsewhere. It was testified to by the plaintiff and by the bookkeeper, Thomas B. Wright, that he audited all of the costs of construction, operation and beaching of the boats from the exhibits furnished by "Doc" Gordon himself, which were in the custody and control of the Court Clerk at Fairbanks and that the cost of construction, operation, beaching, insurance and everything that could possibly be charged to the plaintiff's boat was overpaid by its earnings to the extent of \$1,697.29. Then at the close of all of the evidence, Mr. Hurley, acting on behalf of the plaintiff, moved the Court to instruct the jury to return a verdict in favor of the plaintiff and against the defendant as prayed for in the complaint for the reason there was no evidence on behalf of the defendant contradicting the evidence of the plaintiff as to the contract and as to the money earned by the "Elaine G" and barge and no evidence contradicting the cost of construction and the cost of operation. The evidence clearly showed that there was sixteen hundred and some odd dollars earned by the plaintiff, more than the cost of construction and operation of the "Elaine G" and barge built and owned by the plaintiff. The Court overruled the motion and an exception was allowed to plaintiff. (See T.R. p. 106.) Undoubtedly, the Court should have sustained this

motion. There was not a single place in the defendant's evidence where he contradicted the agreement between the plaintiff and himself and the only contradiction at all was his reversal of his former testimony as to one certain manifest and then he did not directly deny receiving the money thereon, but admitted receiving \$77,791.66 and in backing up on his former testimony in positively identifying the manifests showing the freight hauled by the plaintiff, he would not definitely deny the correctness of the particular manifest, but only dodged it by evasive testimony under pressure by his attorney and the manifest that he was doubtful of was stapled in a bunch of other manifests, all of which he had previously picked out of his files and positively identified as being the manifests of the freight hauled by the plaintiff and the amounts shown thereon as being within a few cents of the correct amount of money that he received payment of through the Bank of Fairbanks, which payment was made by the United States Government and the plaintiff positively identified this manifest and testified unequivocally about hauling the particular load and this was verified by Charlie Smelzer, who was a defendant's witness. It is our contention that when a plaintiff has proven his case and the defendant introduced no evidence to disprove any part thereof and especially in this instance where the defense corroborated practically all of the plaintiff's testimony, then the plaintiff was entitled to a judgment as prayed for in his complaint.

Could it be said by any fair-minded Court or jury that such an agreement could be arrived at as was unquestionably the case here; that the plaintiff went ahead and carried out every particle of his agreement, earned a sufficient sum with his boat and barge to pay off all of the cost of construction, operation and beaching, received no pay whatsoever for his services, worked often 24 hours per day and then when everything was over and the boat and barges, including the repair and rebuilding of "Doc" Gordon's "Bonnie G" had been fully paid for; that \$77,791.66 had been deposited to the defendant's account; when he himself testified that he had \$2,000.00 and borrowed something like \$40,000.00 (See T.R. p. 91) showing an expenditure of \$42,000.00, according to his own testimony and then the evidence shows conclusively that the plaintiff's earnings from his boat and barge amount to \$52,802.75 and the defendant admits getting every cent of this money in his own account at the bank and the undisputed evidence of the plaintiff that all of the indebtedness was completely paid off, then could it be said that any Court of justice would permit the defendant to just arbitrarily take the boat from the place it was beached and keep it and operate it on the river and give the plaintiff nothing? Such a conclusion could only be conceived in the mind of an unjust person. No person whether it be Court or jury could possibly justify such a judgment as was rendered here and, therefore, it became the duty of the trial Court to sustain the plaintiff's motion to instruct the jury to return a verdict for the plaintiff as prayed

for. We respectfully appeal to the conscience of this Court to reverse this judgment and render the judgment that should have been rendered sustaining this motion for an instructed verdict and do justice between these persons.

We will now attempt to set forth as near as we can the contention of the witnesses as to what the contract between the plaintiff, Warren L. "Bud" Hager, and the defendant, Clyde E. "Doc" Gordon really was. Hager testified to his version of the contract which is as follows:

Doc thought it was a good idea. He said it was fine, to get this boat business, but he said, "Come in with me. I will take you and we will go to the bank and see if we can get the money, and I will go outside and get machinery and we will build the boat here. You can build it while I am out getting machinery, and then you will be in with me down there." He liked the way I operated—the way I worked. He said: "I think you will be good on it. You will have a boat and a barge, and I will have a boat and a barge, and after this money is all paid—'we was going to make a lot of money', he said, 'I am going to sit back and take it easy and you can take both boats. What money you make with your boat and barge will go into paying it off, and as soon as it is paid off, it becomes yours, free and clear.' " (T.R. p. 61.)

Then the defendant called a witness by the name of Charlie Smelzer, who was an employee of the defendant, Clyde E. Gordon, and he gave his version of what

the contract was between the plaintiff and the defendant, which was about as follows:

He understood that "Doc" and "Bud" had some kind of an agreement as to the ownership of the boats; that was what they said themselves. He had heard "Doc" talk about it. He heard "Doc" say in the first place "Bud" and him had an agreement about building a boat. "Doc" says: "I will build you a boat and give it to you after it is paid for providing you call up with me and help me." He understood the "Elaine G" and one barge was to be operated by "Bud" and when it was paid for and was clear it was to be "Bud's" property providing that everything was carried out. (T.R. p. 105.)

Then the only other witness who attempted to testify as to what the contract was was "Doc" Gordon, the defendant, and he testified:

I was to build the boat, get a release from the army for him to operate the boat. He would operate it until such a time that it had earned enough money to pay for its construction, its operation and all expenses; both boats to be operated together so as to save equipment and crew; help one another out when we got in trouble and when that boat had earned enough—sufficient money to pay itself off clear, I was all clear, then I would give him a title to the boat and he could go into business for himself or go into partnership with me, any way he could see fit at that time.

In analyzing the testimony of the plaintiff and the testimony of the defendant and the defendant's wit-

ness, Smelzer, and this being the sole and only testimony affecting the contract, there is not a scintilla of difference in the facts. They all amount to the same thing and in truth and in fact no one has denied a single thing that was testified to by the plaintiff, Warren L. "Bud" Hager. He testified that he and another man had planned to build a boat and to raise what money they could and borrow all they could and build as big a boat as they could for the money they could raise; that he told his Uncle "Doc" about their plans. Now this must be true because it remains undenied even though the defendant, "Doc" Gordon, testified fully and so did his witness, Smelzer, and no one contradicted a single word of that. Then the plaintiff testified that the defendant, Clyde E. "Doc" Gordon suggested that he come in with the defendant; that they would go to the bank and borrow the money; that "Doc" had \$2,000.00 and they would borrow the rest of the money at the bank. "Doc" would go outside and buy machinery and Warren L. Hager would go ahead and build the boats. He further testified that they agreed to this and went to the bank together, borrowed the money together, Hager signed the notes, "Doc" went outside to buy machinery, Hager leased a site to build the boats, the lumber had been ordered by "Doc", the plaintiff bought two quonset huts and a pick-up automobile, drew \$2,000.00 out of the bank to pay for them, set the quonset hut on the ground, started the work. sold the other quonset hut for \$800.00, put the money back in the bank, worked constantly from then until the boats and

barges were finished. This stands undenied by anyone and according to the rules of evidence being reasonable, straight-forward, clean and undenied evidence, it amounts to an admission. Especially is this true when practically all of it is corroborated by the defendant or the defendant's witness, Smelzer.

Gordon had a perfect right and a world of opportunity to introduce evidence showing what part of the \$77,791.66 that he admitted getting, was actually earned by him with his boat and barge, and this honorable Court will remember that the plaintiff tried to prove exactly what each party with their boat and barge earned and collected and the defendant objected to making that proof and the Court refused to allow the introduction of the manifests of the "Bonnie G" the defendant's boat, even though they had been separated by the defendant himself and stapled together and if we were favored with the manifests of the loads hauled by the "Bonnie G" and the amount of money received from each of its manifests and had the amount admittedly earned by the "Elaine G" to the extent of \$52,802.75, then you would have the amount of \$77,791.66 and the greatest figure that "Doc" Gordon ever placed on the cost of the construction of the boats, barges, etc., is shown by his testimony on page 91, T.R., as follows:

He thinks he borrowed altogether \$40,000.00 to build the boat and barges and to rebuild the "Bonnie G". It totalled somewhere around \$40,000.00, he had borrowed from all over and from individuals in all. The undisputed evidence also shows that he had approxi-

mately \$2,000.00 of his own. Now putting those together would make a total cost according to "Doc" Gordon's testimony of \$42,000.00. However, the plaintiff testified much more favorably and said that it cost a few dollars over \$50,000.00 to build, equip, operate and dry-dock his boat and barge and that allowing the defendant all of those figures, he overpaid all of the cost of building, equipping, operating and dry-docking of his boat and barge to the extent of \$1,697.29. It should be borne in mind that "Doc" Gordon had possession of all of the receipted bills, the cancelled checks, the bank accounts, the manifests and a complete audit of these things could have been done and that the only time that the plaintiff had an opportunity to audit these matters was during the period of time that they were exhibits in the equity case that was dismissed and while they were held by the Court Clerk in his office in Fairbanks and a person who made the audit at the time to-wit, Thomas B. Wright, was hired to make the audit and testified to the correctness of the audit and that every charge and credit were properly considered. The defendant Gordon must have known that this audit was correct or he would have introduced these exhibits in this case and would have had a perfect audit made to disprove the facts alleged by the plaintiff.

Now, therefore, there being no controversy of any material variance as to the contract, then the defendant had no right to take the plaintiff's boat and run off down the river and keep it and it was the duty of the Court when this matter was called to his attention

by a motion of the plaintiff at the close of all of the evidence to instruct the jury to return a verdict for the plaintiff. Then, and in that event, it was error for the Court not to have done so.

Council for defendant may argue that the plaintiff was not entitled to recover the \$10,000.00 damage item set forth in his second cause of action. Again it must be remembered that the plaintiff testified he was damaged to that extent and the defendant, though on the stand, and with ample opportunity to deny that, did not deny it in a single word and the evidence of the plaintiff as to the right to recover the \$10,000.00 damage for the wrongful taking of the boat was clear, concise, clean and convincing. Standing undenied after opportunity having been presented to the defense to deny the same, it became an admitted fact. Therefore, it is our contention that an instructed verdict should have been rendered and in support of this position, we cite the following cases, to-wit:

In the case of *Robinson v. Denver City Tramway Co.*, 164 Fed. 174. The Eighth Circuit Court of Appeals in passing on a similar question found:

“4 Trial—Question for Court or Jury—Direction of Verdict. When the evidence is undisputed, or is so clearly preponderant that the court, in the exercise of a sound judicial discretion, could give effect to but one verdict, the case may, and should, be withdrawn from the jury, and their verdict directed. (Syllabus by the Court.)”

This rule was also followed by the same Court in *Bell v. Carter*, 164 Fed. 417, as follows:

“1 Trial (141*)—Question For Court Or Jury—Direction Of Verdict. Whilst it is true that a substantial conflict in the evidence must be determined by the jury as a question of fact, it is also true that when the evidence is undisputed, or is so clearly preponderant that it reasonably admits of but one conclusion, the proper disposition of the case upon the evidence becomes a question of law, to be determined by the court. (Ed. Note.—For other cases, see Trial, Cent. Dig. 336; Dec. Dig. 141.*)”

Judge Sanborn again affirmed this statement of the law in the case of *Patillo et al. v. Allen-West Commission Co.*, 131 Fed. 680. The 4th Syl. reads:

“4. Trial—Court May Withdraw Question of Fact From Jury. Where the evidence upon a question of fact is so clearly preponderant, or of such a conclusive character, that the court would be bound, in the exercise of a sound judicial discretion, to set aside a finding in opposition to it, it is its duty to withdraw the question from the jury and direct their finding. (Syllabus by the Court.)”

The Supreme Court of Iowa in passing on this question followed the general rule laid down in the above cited cases, and in the more recent case of *Gregg v. Middle States Utilities Co. of Delaware*, 239 N.W. 66:

“(9, 10) To hold otherwise would be contrary to the rule so well stated by Justice Hamilton in *Baker v. General American Life Ins. Co.*, 222 Iowa 184, 188, 268 N.W. 556, 558: ‘But when the evidence all points in one direction, is not in

material conflict on the issues involved, and there are no circumstances which tend to impair or impeach the same, and is not susceptible of inherent weaknesses, improbabilities, and incongruities, which in and of themselves naturally arise to contradict or impeach the weight and credibility of the utterances of the witnesses, then it can most certainly be said as a matter of law that the record presents a case about which the minds of reasonable men cannot differ, and the court is, under such circumstances, warranted in directing a verdict, and there is no sound principle standing in the way of such action on the part of the court.' And by Justice DeGraff in *Kern v. Kiefer*, 204 Iowa 490, 492, 215 N.W. 607, 608: 'A verdict should be directed: (1) Where but one reasonable conclusion can be drawn from the proof adduced. (2) Where the questions of fact are clearly established by unconflicting evidence. (3) Where there is no substantial evidence to overcome a prima facie case. (4) Where by giving the opposite party the benefit of the most favorable view of the evidence, the verdict against him is demanded.'

The judgment is therefore affirmed."

It seems to us that the rule set forth in American Jurisprudence in Volume 53 on page 291, is the correct and recognized rule, and from this we quote, as follows:

"* * * but the more generally approved rule is that it is not only permissible, but proper, for a trial court to direct a verdict upon unimpeached oral testimony given in behalf of the party having the burden of proof where such testimony is

direct, positive, and unequivocal, is not contradicted either directly or indirectly, and is not susceptible of inherent weakness, improbability, or incredibility.²⁰ This principle underlies the great majority of the cases cited in the preceding sections which recognize it to be not only within the power, but the duty, of the court to direct verdicts when undisputed facts support only one conclusion, or where a contrary verdict would have no support in the evidence.”

“As has been said, credibility, either one way or the other, should make no difference in the operation of the fundamental principle which necessarily underlies the direction of verdicts in all cases. The question whether reasonable minds could arrive by reasoning processes at more than one opinion or conclusion is always a question for the trial judge.”

“A jury has no greater or better right to act arbitrarily or unreasonably in forming a judgment or opinion as to whether or not a witness speaks the truth than it has to act unreasonably in arriving at any other opinion or conclusion.”

The Seventh Circuit on July 24, 1940, in the case of *Foote Bros. Gear & Machine Corporation v. National Labor Relations Board. Independent Union of Gear Workers v. National Labor Relations Board et al.*, Nos. 7088, 7252, found in Volume 114 Fed. Second at page 611, have clearly and distinctly analyzed the same question presented here, and from the opinion over on page 622 we quote:

“(14-17) In reaching our conclusion we wish to make it clear that (a) a finding by an examiner

will be accepted when substantial (although contradicted) evidence supports it. (b) This rule (a) does not relieve us of a duty to examine the evidence and analyze and distinguish, when necessary between the factual and conclusion statements of a witness. (c) A statement which alone may afford substantial support for a fact finding may lose its weight entirely in the face of uncontradicted facts inconsistent with it. (d) Statements which are witness' mental deductions from physical facts weaken and sometimes lose their entire probative force in the face of undisputed facts which are irreconcilable with the deductions of said witness."

It is so apparent that where the testimony of the defendant, Clyde E. (Doc) Gordon, varies in the slightest from that of the plaintiff, Warren L. (Bud) Hager, that he is merely giving his conclusions, and are never a direct denial of a single thing that was testified to by the plaintiff.

The Supreme Court of South Dakota in a very long and well reasoned opinion by Justice Campbell completely covers this question, and we beg the indulgence of this Court in setting out at length from this intelligent analysis of this question found in the 223 N.W. at page 585, in the case of *Jerke v. Delmont State Bank*, We quote from the opinion commencing on page 590, as follows:

"(7) If reasonable minds could arrive at but one conclusion from the evidence, by applying their intellectual processes thereto, then the question as to whether the party having the burden

of proof has established the issuable facts in that particular case is a question to be decided by the judge, and not by the jury, and it is probably a mere matter of phraseology and definition of terms in such a case whether we say, as a matter of language, that it then becomes a question of law of the court, or whether we say that, being a question of fact upon which reasonable minds could not differ, it is such a question of fact as will be decided by the judge, and not by the jury, though undoubtedly the latter phrasing is more accurate. The only objection thereto is that it seems to conflict with the words so often used in the books since Lord Coke first quoted, '*Ad quaestionem facti non respondent iudices, ad quaestionem juris non respondent juratores,*' namely, that 'questions of fact are for the jury.' Like most glittering generalities, this statement, to borrow the expression of Professor McBain, is 'weak and infirm of its own generality.' "

"Granting that it may have been true at a time when the function of jurors was to report the facts to the court of their own knowledge, it has not been true since the days, now more than 200 years, when it came to be the function of the jury to determine the facts by applying the reasoning processes of their minds to the evidence brought into court. Jurors do not determine all questions of ultimate fact, even in jury cases. They determine the existence or nonexistence of those facts, and those only, with reference to the existence of which the judgment of reasonable men might differ as a result of the application of their intellectual faculties to the evidence. If the proof offered by the party having the burden in support

of the existence of ultimate issuable facts is so meager that a reasonable mind could not therefrom arrive at the existence of such ultimate fact, there is nothing for the jury and the judge not only may, but should, direct a verdict against the party having the burden of proof. This is the ordinary case of directing a verdict against the party having the burden of proof, because of the insufficiency of the evidence, and with this no courts seem to have had any difficulty. On the other hand, it is just as true that, if the party having the burden of proof offers such evidence in proof of the existence of the ultimate issuable fact that a reasonable mind functioning thereon could not escape the inference, or conclusion, or opinion, or judgment that such fact existed, then here too is left no question for the jury, and the judge should direct a verdict in favor of the party having the burden of proof. Here, also, courts for the most part have had little difficulty. The general procedure is laid down, and the language used by the courts indicated, in 26 R. C. L. 1073."

"A few courts, very considerably in the minority, however, seem here to have been troubled with the matter of credibility of witnesses. The factor of credibility less frequently enters into the direction of a verdict against the party having the burden of proof, because in such case the credibility is usually assumed, or at least not brought into question. But the entry of the factor of credibility, either one way or the other, can make no difference in the operation of the fundamental principle which necessarily underlies the direction of verdicts in all cases. The question of whether reasonable minds could arrive by reason-

ing processes at more than one opinion or conclusion is always a question for the judge. The entry of the factor of credibility means simply the existence of one more item upon which the intellectual faculties are to operate. Of course, as the items to be reasoned upon increases in number, the likelihood of there being but one possible reasonable result mathematically diminished; but, when that situation does exist, it should not be affected by the fact that credibility is also involved."

"A jury has no greater or better right to act arbitrarily or unreasonably in forming a judgment or opinion as to whether or not a witness speaks the truth than it has to act unreasonably in arriving at any other opinion or conclusion. Forming an opinion as to credibility should be just as much a process of rationalization or reasoning from the data presented in the light of human experience as the formation of any other opinion or judgment in a court, and this has always been recognized by the great majority of the courts, and the proposition, subject to various qualifications, has been laid down in some such phrasing as that 'the positive testimony of a disinterested, uncontradicted witness cannot be arbitrarily or capriciously disregarded by the jury'. See a number of the older cases collected in a note in 81 Am. Dec. at page 268."

"Pursuing the matter somewhat further, we come to the precise question involved in the instant case, where the party having the burden of proof depends for establishing the existence of the ultimate fact, either in whole or in part, upon the

oral testimony of a witness who is interested in the transaction.”

“The answer to this question does not state any rule of law, but merely announces a determination of logic or reason. The only rule of law involved is that which announces that the judge will determine the matter without the assistance of the jury, when reasonable minds applied to the evidence could properly come to but one conclusion. The legal principle is simple, and the real question in every case is not a question of law in any proper sense of the word, but is a question of logic, or reason, or judgment, however we may choose to phrase it, and it is in each case a question for the judge (or for the appellate court, as the case may be) and must remain such a question, regardless of the admitted fact that there is no external standard or yardstick whereby we may determine with mathematical precision what result reasonable minds must arrive at in the field of opinion or judgment, by the application of their intellectual faculties to certain given data. The standard of reasonableness is subjective, and it is the standard of the judge that must be used; probably in the final analysis the standard of the court of last resort in any given jurisdiction; but the nature of determination remains the same. When a court holds in any given case or upon any given facts, that the direction of a verdict is proper, it is not in any strict sense announcing a rule or doctrine of law, but is merely announcing its judgment or opinion as a matter of reason and logic that in that case and upon those facts reasonable minds could not differ as to the result to be reached.”

“Our question further narrows to this then:

“Ought a judge to say, as a matter of reason and judgment, that the mere fact that a witness is interested in the matter in controversy, in and of itself, without regard to other circumstances of the case, makes it reasonable to disbelieve or to fail to believe his testimony, in the light of general human experience? We do not believe that any court has gone so far as to lay down any such doctrine, or enunciate any such general principle, whether it be viewed as a matter of law or as a matter of logical rationalization. The sound view seems to us to be this: That each case must depend upon its own facts, and that the mere fact of interest in the controversy does not, in and of itself, and apart from other circumstances appearing in the case, render it a reasonable thing to disbelieve the testimony of a witness whom otherwise it would be unreasonable to disbelieve, and this, we think, is the established practice of the great majority of courts.”

We sincerely contend that the trial court erred in not sustaining plaintiff's motion for an instructed verdict based on the uncontradicted evidence of the plaintiff corroborated by the defense testimony in all important matters.

THIRD POINT RELIED UPON FOR REVERSAL.

In the assignment of errors printed in the transcript at page 45 you will find the following testimony and record which appellant contends was reversible error and by this ruling and the excluding of this evidence, the jury was confused to such an extent

that it contributed in the manifest error in the judgment here. From page 45, T.R., we quote:

“The Court erred in sustaining Defendant’s objections as follows:

‘Q. Mr. Gordon, will you look in there and get the manifests—all of the manifests?

Mr. Taylor. Just a moment. A point of information. Is Mr. Bell referring to the manifests of the “Elaine G”?

Mr. Bell. Both the manifests of the “Elaine G” and the “Bonnie G”.

Mr. Taylor. We object to the manifests of the “Bonnie G”, as the earnings of that boat are not in controversy here, your Honor.

The Court. Objection sustained.

Mr. Bell. Exception.’ ”

Without restating the evidence which has been stated above, we especially call to the Court’s attention that Mr. Gordon admitted receiving cash through the Bank of Fairbanks to the extent of \$77,791.66 and contends that he paid “Cap” Lathrop \$1000.00 personally from the earnings and claims to have borrowed and repaid between five and six thousand dollars; that he declined to give us the facts with relation thereto. Just how much money the defendant actually received in excess of the \$77,791.66 that he admitted receiving through the Bank of Fairbanks we do not know, but we do know by all of the admitted facts that the government paid to the Bank of Fairbanks two checks, one in the sum of \$44,297.91 and another in the sum of \$33,095.52. These the defendant Gordon admitted getting, one September 11, 1945, and the other we

do not have the date. He also admitted getting \$308.23 earned by the "Elaine G" in towing a scow and admitted that he was paid \$50.00 and \$40.00 apiece for the "Elaine G" and the "Bonnie G" for stand-by time and we were refused the privilege of introducing the manifests of the earnings showing the amount of freight actually hauled by the "Bonnie G". While it is true the "Bonnie G" boat and the new barge built by Hager while "Doc" was outside are not in dispute and the title thereto is admittedly in the defendant and plaintiff claims no interest therein, if the Court had permitted the introduction of the manifests that were picked out by the defendant himself as being the manifests of the freight hauled by the "Bonnie G", then it would have been very easy to have ascertained the full amount of money that the defendant actually received and it would have clarified the issues so that the jury would not have become so confused.

Since Clyde E. Gordon, the defendant, testified that they were working together, each hauling all he could and the earnings of each boat and barge were applied to the cost of each man's equipment; therefore, by the introduction of the manifests of the "Bonnie G", it would have cleared and unquestionably have shown by indisputable facts that the cost of the building of the "Elaine G" and the barge and the building of the new barge for the defendant, Mr. Gordon, and the cost of rebuilding the "Bonnie G" was all paid for with plenty left over, but by the ruling of the Court, it left the matter confused and could have been the cause for the returning of the verdict that was such a travesty on justice as herein referred to.

FOURTH POINT RELIED UPON FOR REVERSAL.

We wish to present for our fourth point relied upon for reversal our fifth and sixth assignments of error, which are as follows:

V.

“That the Court erred in rendering the judgment that it did render on March 2, 1948, denying Plaintiff any recovery and taxing all of the costs of said case against the Plaintiff.”

VI.

“The Court erred in rendering a judgment in favor of the Defendant and against the Plaintiff for \$5,000.00 attorney’s fees without any evidence whatsoever having been introduced or even offered to base such judgment on, and that said judgment is unauthorized, unjust, excessive, oppressive and beyond the powers of the Court to render, and there is no just reason therefor, and there is no valid statute of the Territory of Alaska and no laws of the United States of America authorizing such judgment.”

It must be remembered that while this case was pending, Section 4065 of C. L. A., 1933 was amended by the Alaska Territorial Legislature. The Section 4065, 1933 C. L. A., is as follows:

“Sec. 4065. What disbursements party entitled to costs may be allowed. A party entitled to costs shall also be allowed for all necessary disbursements, including the fees of officers and witnesses, the necessary expenses of taking depositions by commission or otherwise, the expense of publication of the summons or notices, and the

postage where the same are served by mail, the compensation of referees, and the necessary expense of copying any public record, book or document used as evidence on the trial. The prevailing party may tax as costs the sum of twenty dollars when the case is dismissed before it is set for trial after appearance by the opposite party, and the sum of forty dollars when not disposed of until after it is set for trial; for each deposition such sum as may be allowed by the court; the per diem actually paid the court reporter but not to exceed ten dollars per day; witness fee for each day a witness is necessarily absent from his usual place of abode by reason of attendance upon court, with traveling expenses at fifteen cents per mile actually and necessarily travelled; a party to the action, if a witness, shall be entitled to the same fee and travelling expense as any other witness; and a reasonable attorney's fee to be fixed by the court. (1345-CLA; 1-38-23).''

In 1937 this statute was amended by striking the words, "and a reasonable attorney's fee to be fixed by the court." Then in 1947 the statute was amended again by adding the same words, which makes the law read as it did before either amendment was made, and as set forth above.

This is the only authority by which the trial judge could have granted an attorney's fee to the defendant's attorney in the sum of \$5,000.00. The trial of the case consumed a part of three days and there was not a scintilla of evidence either by affidavit or oral testimony as to the extent of the work performed by the attorney for the defendant and not a word as to

the value of the services rendered and not even an oral motion made in open Court to allow the defendant an attorney's fee. This matter all having arisen in the mind of the trial judge clearly indicates the bias and prejudiced attitude of said judge. There was not a scintilla of evidence throughout the entire trial to even suggest bad faith on the part of the plaintiff or to disprove or question his sincere effort to regain the custody of the property that he had had in his possession for more than a year, which had been unjustly taken from him while it was dry-docked on the Chena River below the town of Fairbanks. The defendant always referred to the property as the plaintiff's boat and barge and the ownership and right of possession was never seriously disputed, and unquestionably there is not a scintilla of evidence contradicting the plaintiff's right of possession. He had possession of it from the time it was built until it was wrongfully taken by the defendant. Therefore, it could not conscientiously be said that the plaintiff, even if the Court should hold he was not entitled to the property, had ever wrongfully or fraudulently brought this lawsuit, which would justify the Court in voluntarily assessing a \$5,000.00 attorney's fee against him. This only goes to show malice, prejudice and ill feeling toward this young service man whose record, as far as is ascertainable, is spotless. We believe the law to be that an attorney's fee of this kind based upon the statute above quoted, rendered without any evidence to support the same is error and in support of our position we cite the following cases, to-wit:

The above-mentioned statute being taken originally from Oregon, and the Supreme Court of Oregon having passed on practically the same question involved here, we will first cite Oregon cases.

For the sake of brevity in this brief we will first cite *Columbia River Door Co. v. Todd et al.*, 175 Pac. 860. This case is based upon old cases as far back as 1885, such as:

Bowles v. Doble, 11 Or. 474, 5 Pac. 918;

Bradtfeldt v. Cooke, 27 Or. 194, 40 Pac. 1, 50 Am. St. Rep. 701;

Cox v. Alexander, 30 Or. 438, 46 Pac. 794;

First National Bank v. Mack, 35 Or. 122, 57 Pac. 326;

Lassas v. McCarty, 47 Or. 474, 84 Pac. 76;

Wright v. Conservative Investment Co., 49 Or. 177, 89 Pac. 387;

Waymire v. Shipley, 52 Or. 464, 97 Pac. 807;

Mael v. Stutsman, 60 Or. 66, 117 Pac. 1093;

Sattler v. Knapp, 60 Or. 466, 120 Pac. 2.

From the *Columbia River Door Co. v. Todd* case above cited we quote the first syllabus, which is as follows:

“That counsel agree to allow the court to determine attorney’s fees in a lien foreclosure case does not obviate the necessity of introducing evidence upon which the court may base a finding as to an issue of fact.”

The *Columbia River Door Co.* case above cited was followed by the Supreme Court of Oregon in the case of *State v. Ganong et al.*, 184 Pac. 233. The Legis-

lature of Oregon had passed an act, a part of which reads (quoting from page 237 above case):

“The costs and disbursements of the defendant, including a reasonable attorney’s fee to be fixed by the court at the trial, shall be taxed by the clerk and recovered from the corporation, * * *.”

Another act in Oregon, Section 7448, L. O. L., provides (copying from page 239, same case):

“The court shall, upon entering judgment for the plaintiff, allow as a part of the costs all moneys paid for the filing and recording of the lien, and also a reasonable amount as attorney’s fees.”

This case being an appeal principally on the question of allowing an attorney’s fee the last paragraph of the opinion clearly sets forth the views of the Supreme Court of Oregon at the time this case was decided and construes exactly the same words as are used in the Alaska statute as amended, which is now being considered, except the Oregon statute reads: “Including a reasonable attorney’s fee to be fixed by the court at the trial.”

The wording of the other Oregon act, 7448 above mentioned is: “* * * also a reasonable amount as attorney’s fees.”

The Alaska Statute uses these words: “and a reasonable attorney’s fee to be fixed by the court.”

You will note the content of each of the statutes is identical and means exactly the same thing. The last

paragraph on page 239 of the 184 Pac., is very definite, and is as follows:

“(6) It is true that in *Portland Sash & Door Co. v. Parker*, 61 Or. 203, 121 Pac. 1135, and in *Wills v. Zanello*, 59 Or. 291, 117 Pac. 291, it was stipulated by the litigants that the court could fix the amount of an attorney’s fee, and, based upon such stipulation, the court did fix the fees. But in neither of those cases were any of the questions now under consideration raised or discussed or decided, and hence neither of those decisions should be regarded as a precedent. All the arguments that have been here advanced in support of the position taken by the defendants, including the argument growing out of the difference between fees allowed by statute and those stipulated for by contract as well as the argument based upon the records made in *Portland Sash & Door Co. v. Parker*, 61 Or. 203, 121 Pac. 1135, and *Wills v. Zanello*, 59 Or. 291, 117 Pac. 291, and also the argument predicated upon the holdings made in some of the other states, were presented and considered in *Columbia River Door Co. v. Todd*, 90 Or. 147, 175 Pac. 443, 860; and in that case this court squarely decided that the attorney’s fee allowed by the statute was an issuable fact to be pleaded and proved by evidence. The act of 1913 was not intended to dispense with pleading and evidence. Not even ‘costs and disbursements’ can be allowed a successful litigant in any suit or action unless he pleads his ‘costs and disbursements’ by filing a verified cost bill, and if the defeated litigant desires to contest the cost bill he must do so by filing verified objections, and these two verified papers constitute the

pleadings. The statute of 1913 does not contemplate that the person presiding 'at the trial' shall be a compulsory witness and at the same time and in the same proceeding be the judge of his own testimony. There was no evidence upon the subject of attorney's fees, and there was no stipulation fixing the amount of an attorney's fee; and therefore to allow an attorney's fee is to repudiate an express ruling made less than one year ago, and after the most careful and deliberate consideration, in *Columbia River Door Co. v. Todd*, 90 Or. 147, 175 Pac. 443, 860, as well as to overrule every precedent dealing with the subject. *McInnis v. Buchanan*, 53 Or. 533, 542, 99 Pac. 929; *Sattler v. Knapp*, 60 Or. 466, 120 Pac. 2. The judgment appealed from should be modified by striking out the item of \$300 for attorney's fee."

The last case that we are able to find that the Supreme Court of Oregon has decided, on this question, is *Edwards v. Wirtz*, 118 Pac. (2d) 114, and on the petition for rehearing based on the matter of allowing an attorney's fee where no evidence was offered Chief Justice Kelley wrote the opinion found on page 120, which is as follows:

"(12) Upon consideration of appellant's petition for rehearing, we find no support in the testimony for respondents' allegation that \$300 is a reasonable attorney's fee to be allowed herein. This allegation is denied in appellant's reply. 'Upon this issue no evidence was offered by either party, and this being so, the statutory fee only will be allowed.' *Lassas v. McCarty*, 47 Or. 474, 484, 84

P. 76, 80. See cases there cited. Also *Columbia River Door Co. v. Todd* (on petition for rehearing), 90 Or. 147, 154, 175 P. 443, 860, and cases there cited."

"In the case at bar, we find no stipulation authorizing the trial court to fix the fee; and hence such cases as *Olson v. Boling*, 120 Or. 554, 252 P. 961, and *Randolph v. Christensen et al.*, 124 Or. 661, 671, 672, 265 P. 797, are not in point."

"The former opinion is therefore modified to the effect that the allowance of \$200 as a reasonable attorney's fee in favor of defendants should be and is deleted from the final decree herein."

In the case of *Burleigh Bldg. Co. et al. v. Merchant Brick & Building Co.*, 59 Pac. 83, the Court of appeals of Colorado on November 13, 1899, passed on this question, the 4th syllabus reads as follows:

"4. On foreclosure of a mechanic's lien it is error to render judgment for attorney's fees without evidence of the services performed and their value."

In the case of *Holmes v. S. H. Kress & Co. et al.*, 223 Pac. 615, the Supreme Court of Oklahoma in passing on this question, said in the first and only syllabus as follows:

"Section 7482, Comp. St. 1921 (section 3877, Rev. Laws 1910), authorizing the recovery of a reasonable attorney's fee by the prevailing party, in action brought to establish a statutory lien, and that same may be fixed by the court and taxed as cost, in the action does not authorize the court to

render judgment for the amount prayed for by the prevailing party as an attorney's fee without a hearing on the question and the taking of evidence, to determine what is a reasonable fee in the given case.

The above case followed the case of *Holland Baking Co. v. Decks*, 170 Pac. 253. The 5th syllabus reads:

“5. Costs—Attorney's Fees—Evidence—Statute. Where an action is brought upon a promissory note for the foreclosure of a lien upon collateral given to secure the payment of said note, an attorney's fee, under section 3877, Revised Laws 1910, may be awarded the successful party in the action and taxed as costs, but the trial court is without authority to award such attorney's fee without evidence as to the value of such attorney's fee.”

The above Oklahoma cases have been cited with approval in the following Oklahoma decisions:

L. S. Cogswell Lumber Co. v. Foltz et ux., 275 Pac. 333;

Bilby et al. v. Gibson et al., 271 Pac. 1026;

Board of Education of Oklahoma City v. Thurman, 247 Pac. 996;

United States Fidelity & Guaranty Co. v. Town of Comanche et al., 246 Pac. 238.

Getman v. Hayhow, 229 Pac. 559;

Oklahoma Pipe Line Co. v. Hoefer, 229 Pac. 440;

Holiday Oil Co. et al. v. Smith et al., 228 Pac. 775.

The Supreme Court of Kansas on July 9, 1891, in the case of *State ex rel. Curtis County Attorney v. Durein et al.*, 27 Pac. at 148, established the rule in Kansas, which is as follows:

“4. Upon the rendition of a judgment in such contempt proceeding the court rendering the same may allow a reasonable attorney’s fee in favor of the plaintiff and against the defendant therein, to be taxed and collected with other costs in the case; but no such allowance can be made in the absence of any proof as to what constitutes a reasonable fee.”

Indiana follows this same rule, see *Kindel v. French*, 131 N. E. 277.

The Supreme Court of Indiana in the following cases upheld the rule laid down in the above cited case.

Legros v. Culberson, 134 N. E. 907;

Winslow Gas Co. et al. v. Plost, 122 N. E. 594;

E. Horn Realty & Investment Co. v. State ex rel. Lindsey, 180 N. E. 871;

Jackson et al. v. J. A. Franklin & Son et al.,
23 N. E. (2d) 23;

Waverly Co. et al. v. Moran Electric Service, Inc., 26 N. E. (2d) 55.

Sixth syllabus reads as follows:

“6. Mechanic’s Lien. In the foreclosure of a mechanic’s lien, it is error to include an allowance for attorney’s fees where there is no evidence offered as to the value thereof.”

The Supreme Court of Florida in 1903 in the case of *Gunby et al. v. Drew*, 34 Southern 305, passed on this question, and the first syllabus reads as follows:

“1. It is error to allow an attorney’s fee to the prevailing plaintiff under the lien law (Rev. St. 1892, §1747) without proof of the reasonableness of the amount thereof.”

There being no evidence whatsoever upon which to pass upon as to the value of the services rendered or the amount of work done, and there being nothing alleged in the pleading as to the extent of the services rendered or the value there, and only having been mentioned in the prayer, and the prayer being no part of the allegations, then there was no proper pleading for attorney’s fee. (See T.R. pp. 6 and 7.)

We humbly contend that the rendering of the \$5,000.00 judgment for attorney’s fee was unauthorized under the circumstances, and was error and should be reversed.

FIFTH POINT RELIED UPON FOR REVERSAL.

Appellant wishes to make his XI Assignment of Error his Fifth Point relied upon for reversal, and especially that part thereof with reference to the incompetent evidence permitted to go before the jury effecting the income tax and depreciation to be taken off the earnings of the boat and barge.

What difference did it make, between the plaintiff and defendant, as to whether either had paid their income tax? It is conceded for the purpose of argu-

ment here that neither had done so and the depreciation of the value of the boat and barge could not possibly enter into the question of who had the right of possession.

If the plaintiff had the right, he would have the right of possession in its then condition; if it had depreciated at all that would be his loss, and the question of depreciation would be a matter between him and the government as it effected his income tax, and the same rule would apply to that boat and barge of the defendant.

This is a claim and delivery action between Hager and Gordon, and the United States Government will not be affected in the least by the outcome. At the end of this litigation, someone will be required to pay income tax to the extent of the earnings of each boat and barge.

The Court erred in permitting any testimony concerning the income tax or the depreciation, it only acted to confuse the jury. Then the one and only question on the first cause of action was the right of possession of the "Elaine G" and the barge used in connection therewith, and it was admitted that the plaintiff had had possession of it from the beginning, and had lived on it until he had to move off on the account of fire insurance, and then it is admitted that the defendant took this boat and barge without the consent of plaintiff, from the bank of the Chena River, where he had it dry-docked.

It seems reasonable to us, that each party was entitled to possession of his own boat and barge, and each would be liable to the government for his own income tax, and this evidence going before the jury only helped to confuse them, and the Court committed error in allowing this incompetent evidence to go before the jury.

CONCLUSION.

In conclusion, we humbly contend, that where in the course of human events a terrible injustice has been done some one is responsible, and the Appellate Courts have so many times in the past corrected such rank injustice.

In this case it is so clear to us, that the appellant, the plaintiff below, Warren L. (Bud) Hager, having had the experience in river boat freighting in Alaska, and knowing of the great volume of this, that the Army needed, had the idea of building a boat and barge. Plaintiff and another man were going to pool their resources and borrow all they could and build as large equipment as the money would allow.

The plaintiff went to the defendant, Gordon (Uncle Doc), to request that Charlie Smelzer, who was employed by Gordon, be permitted to work for them, if he could spare him. He disclosed his plans to Gordon; Gordon liked the idea; wanted the plaintiff, Hager, to go in with him; didn't want the other man in on the deal. Gordon took the plaintiff to the bank;

they made arrangements for borrowing the money. Gordon said, "I will go outside and arrange for the purchase of the machinery, you build yourself a boat and barge and build me a barge just like the one you are building for yourself." Warren L. (Bud) Hager agreed. Gordon went outside and spent the winter. Hager leased a site; purchased a quonset hut; cleared off the place; set up a work shop there; carried on the building of his boat, the "Elaine G" and the barge for himself and one for Gordon. Mr. Gordon returned to Alaska. When they were finished except the pilot house on top of the "Elaine G", they were launched and moved below the bridge.

Please bear in mind that each testified that the cost of material and labor used above the bridge should be charged one-third to the defendant, Gordon, and two-thirds to the plaintiff, Hager, and that for the work on the plaintiff Hager's boat done below the bridge, and the cost of operation, including fuel, food, employees, etc., should be charged to him; the same thing as to Gordon's boat, the "Bonnie G". Gordon rebuilt the "Bonnie G," where it was docked below the bridge; then with fine equipment both left on July the 4th, to each haul all the freight they could; each make all the money they could. Every thing that each man earned with his equipment would go to pay off the cost thereof. This went to the bank that furnished the money to build and remodel each man's equipment.

All indebtedness to the bank was then paid off. The defendant, Gordon, testified that he had \$2,000.00

at the beginning; that they borrowed at the Bank of Fairbanks \$37,000.00, and that he borrowed something like \$6,000.00 more from mysterious persons that he refused to explain or disclose the source thereof, but said he borrowed altogether about \$40,000.00 (See T.R. p. 91.) The Bank of Fairbanks received, for hauling done by both men with their equipment, two checks from the United States Government, which amounted to \$77,393.43; which was applied to Gordon's benefit, out of which the bank was paid \$37,000.00. Gordon must have at least a part of the balance of \$40,393.43, the difference, plus the amount he admitted getting for the plaintiff's towing a scow for the Alaska railroad and other items. (See T.R. p. 58.) Gordon, also, had a new large power-driven barge, that must have cost one-half as much as the cost of the plaintiff's equipment, and in addition to this he had the "Bonnie G" all rebuilt; a new engine therein and new machinery installed.

Then the next spring Gordon took all of his equipment, as well as the boat and barge belonging to the plaintiff, and went off down the river for another season's hauling; which was all over before this case was tried.

Warren L. (Bud) Hager testified that the use of his boat, the "Elaine G" and barge, and the damage done thereto during this period, would be at least \$10,000.00, and this stands undenied, although, the defendant was on the witness stand and had ample opportunity to deny it.

Then the trial judge heaped another injustice on the plaintiff, while he stood pennyless as far as the whole enterprise was concerned, by rendering a judgment against him for all of the costs and an attorney's fee of \$5,000.00.

We plead with this Honorable Court to do justice between these parties by rendering the judgment that should have been rendered in the case below, by sustaining the plaintiff's motion for an instructed verdict, and by setting aside all judgments for attorney's fee and costs.

Dated, Fairbanks, Alaska,
September 10, 1948.

Respectfully submitted,
BAILEY E. BELL,
JULIEN A. HURLEY,
Attorneys for Appellant.

No. 11,934

IN THE
United States Court of Appeals
For the Ninth Circuit

WARREN L. HAGER,

VS.

CLYDE E. GORDON,

Appellant,

Appellee.

BRIEF FOR APPELLEE.

WARREN A. TAYLOR,

P. O. Box 200, Fairbanks, Alaska,

Attorney for Appellee.

FILED

OCT 13 1963

PAUL R. OVERMAN, -

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IN THE

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For the Ninth Circuit**

WARREN L. HAGER,

Appellant,

VS.

CLYDE E. GORDON,

Appellee.

BRIEF FOR APPELLEE.

Plaintiff relies upon alleged erroneous instructions of law and calls the Court's attention to Instruction I-A-(4) (Tr. p. 11) as placing too great a burden of proof on the plaintiff. The instruction in question correctly states the question of fact raised by the testimony of the plaintiff. The Court was only outlining what the plaintiff had raised by his pleading and proof. It was certainly incumbent for the plaintiff to prove ownership of the vessel and barge to prevail in an action in claim and delivery. Paragraph I of plaintiff's first cause of action alleges: "That the plaintiff is now and at all times herein mentioned has been the owner and entitled to the possession of the hereinafter described property, * * *: One certain power boat with stern wheel named the 'Elaine G'

and one certain power driven barge * * * 'Elaine G' * * *.' Paragraph II of plaintiff's first cause of action alleges that on the 20th day of April, 1946, plaintiff was in possession, and we presume as owner as he has alleged to be such owner in the preceding paragraph.

It is difficult to follow plaintiff's reasoning that the burden of proving by a preponderance of the evidence the material allegations of his complaint works a hardship on plaintiff. That is a rudimentary rule of law followed by all our Courts. Nothing in the present action would give the District Court or this Circuit Court cause or reason to relax the rule in favor of the plaintiff.

Instruction III (Tr. p. 13) correctly states the law regarding the recovery of property under our claim and delivery statute. Section 3494 Compiled Laws of Alaska, provides that the plaintiff or some one in his behalf shall make an affidavit showing "that the plaintiff is the owner of the property * * *."

Plaintiff's reasoning in regard to the Court's confining plaintiff's proof of ownership to April 20, 1946, is somewhat difficult to follow, as plaintiff sets that date out in his complaint as the date upon which he alleges the defendant took said boat from his possession. On that date he had to establish ownership or right of ownership to prevail in this action. The instructions regarding the verdict were correct. To prevail upon his second cause of action, the plaintiff necessarily had to prevail in his first cause of action. But the jury could not split the verdict.

Plaintiff complains that the figure \$55,000.00 used by the trial Court as the value of the boat was erroneous, but plaintiff's proof indicated that as the value of the boat and barge, but in no way directed that a verdict of that amount would have to be returned by the jury. The boat was available and would have been returned to plaintiff in the event the jury had returned a verdict in his favor. Nowhere did the plaintiff ask for or hoped to receive \$55,000.00. The instruction of the Court was not based upon the pleading, but upon the proof offered by plaintiff. Plaintiff has not indicated in his brief that he offered further and other forms of verdicts for the jury's consideration, and cannot therefore now complain.

There is slight discrepancy in the testimony of plaintiff and defendant regarding the contract between them. It is admitted that plaintiff was to assist in building the boat and barge with defendant furnishing the money which he raised by mortgaging his boat "Bonnie G" and barge, and also the boat and barge to be constructed. Plaintiff admitted that the money used to buy the quonset huts, Ford pick-up and other expenses was from the funds provided by defendant. It is admitted that the expenses were to be prorated, two-thirds to the "Elaine G" and the barge used in connection therewith, and one-third to the barge to be constructed for use with the "Bonnie G", defendant's boat. This computation was carried out by Thomas Wright and Kohler and Boulet, accountants employed by the respective parties, with an exception, Mr. Wright, accountant for plaintiff, failed to compute income tax on the earnings of the "Elaine

G" and barge, which income tax was charged against the Gordon Transportation Company, contractor for the U. S. Army. Income tax is a properly allowable item to be charged against the operation of the boat and barge. It would not be just to say that the boat and barge and operation cost \$50,000.00; the income was \$52,000.00 and that the income tax on the net profit of \$50,000.00 should not be deducted from the gross profit. If such was the case the defendant would have to deliver the boat and barge to the plaintiff and then pay over \$15,000.00 to the Internal Revenue in taxes. Defendant was the operator and charged with the tax. Mr. Boulet testified that the income tax on the earnings of the "Elaine G" and barge operated by plaintiff was \$15,716.00 and the income tax on the "Bonnie G" was \$7,630.00. None of this income tax was paid, but all chargeable to defendant. Nor was depreciation charged against the "Elaine G". Ten per cent depreciation would bring the total earnings below cost of building and operation. Counsel for plaintiff indulges in conjecture in his third assignment of error (Tr. pp. 110, 111) in stating that there is no evidence that the income tax would not have been paid the following year. It was the duty of the plaintiff to compute the income tax on the earnings of the "Elaine G" and show that the same had been paid. On March 15, 1946, it had not been paid and on April 20, 1946, defendant took the boat and barge from the ways.

Next we must consider the testimony of "Doc" Gordon, defendant, that in 1946, he spent \$5,000.00

in new equipment in addition to the labor involved in the installation thereof. (T.R. p. 148.) Plaintiff places undue emphasis upon his fourth point relied upon for reversal of the judgment, to-wit: the allowance of an attorney fee in the sum of \$5,000.00, and defendant's costs. This point is not well taken as plaintiff prayed for a reasonable attorney fee and costs. He submitted all his evidence to substantiate the allegations of his complaint, but no place in the record does it indicate that he offered any evidence of the reasonable worth of the attorney fee prayed for. He relied upon the accepted practice of the trial Court in fixing the compensation of the prevailing party. Plaintiff is in error when he alleges that while the case was pending the Legislature of Alaska amended the law regarding allowances of attorney fees by the Court. This action was filed on the 13th day of May, 1947, whereas the amendment to Section 4065, Compiled Laws of Alaska, 1933, was approved March 27, 1947, and was in effect at all times during the progress of this action. Therefore, the argument of counsel for plaintiff that the amendment of the law allowing attorney fees by the Court was passed during the trial of this action has no truthful basis.

It is true that this was the third action filed by plaintiff against defendant, but the first two were based upon a different theory than the cause at issue.

The first action was commenced by the plaintiff within a few weeks after the end of the season's work in 1945, and before the defendant had had an opportunity to assemble the bills, invoices and other data

necessary to arrive at the amount of the season's business and the earnings therefrom.

Regarding attorney fees, *In re Treadwell*, 23 Fed. 442, the Court held that a fee of \$5,000.00, when an attorney had saved his client \$30,000.00, was not excessive. In the present instance the attorney had saved his client \$65,000.00, or thereabouts.

In *Colley v. Wolcott*, 187 Fed. 595, the Court said:

“A court may properly make allowances for fees to attorneys for services rendered before it upon its own knowledge as to the extent and value of such services.”

The Federal Court, in the cases of *Adams v. Kehlor Milling Co.*, 38 Fed. 281, and *Straus v. Victor Talking Machine Co.*, 297 Fed. 791, also followed the rulings in the above-cited case.

In *McDougal v. Black Panther Oil Co.*, 277 Fed. 701, the Court said:

“In determining what is a reasonable attorney fee, some of the elements to be considered are character of service rendered, the manner in which rendered, the time occupied, the result obtained, and the responsibility resting on counsel.

“In an action involving reasonable compensation for legal services, the Circuit Court of Appeals, as well as a trial court, may be considered experts on the value of legal services.”

The Supreme Court of Oregon, in May, 1935, in the case of *Fisher v. German Co.*, 44 Pac. (2d) 1076, held that it was the Court's statutory duty to allow a

reasonable amount as attorney fees on entering judgment in an action for fraudulent representation, and that such allowance was not error, though no expert testimony was offered and the amount was not fixed by jury.

The Court, *inter alia*, said that in an action for damages it is mandatory for the Court to fix the attorney fee. This was an action for damages, but irrespective of that, it is mandatory in all cases for the District Courts in Alaska to fix the attorney fee allowable to the prevailing party. Evidently, this was the thought of plaintiff's attorneys, for, as pointed out hereinbefore, they prayed for a reasonable attorney fee, but offered no evidence of what a reasonable attorney fee would be. They were following the established practice of the Alaska Court in letting the Court fix the fee. Consequently, an allowance of \$5,000.00 as a fee for saving the defendant's boat and barge, worth \$55,000.00, and damages in the sum of \$10,000.00, is just and reasonable.

In *People v. Thompson*, 43 Pac. (2d) 606, 607, the Court said:

"The law, in relation to the fixing of attorney fees, is well stated in the case of *City of Los Angeles v. Los Angeles-Inyo Farms Company*, 134 Cal. App. 268, 25 P. (2d) 224, 227, as follows: 'The rule is established that, in fixing the fees of attorneys, the court is vested with a wide discretion and the court's award of an amount for such fees will be disturbed only when it is manifest that there has been a palpable abuse of such discretion. * * *'"

Other cases which hold that a Court may fix attorney fees without evidence of value of service are:

Olson v. Boling, 252 Pac. 961 (Ore.);

Randolph v. Christensen, 265 Pac. 797 (Ore.);

Bowman v. Maryland Cas. Co., 263 Pac. 826 (Cal.);

Maxwell v. Young, 28 P. (2d) 989 (Okla.).

Some of the later Federal cases upon this point are, *Pond v. Goldstein*, 41 F. (2d) 76, which was an appeal from the District Court of the Territory of Alaska, First Division, in which case, at page 81, Judge Wilbur, speaking for this Court, said:

“Appellant objects to the attorney’s fees of \$500 allowed plaintiff by the trial court. The statute of Alaska authorizes the successful litigant in a case of this kind to recover a reasonable attorney’s fee to be fixed by the court. Compiled Laws of Alaska, 1913, Section 1341; Session Laws of Alaska, 1923, c. 38. We do not think the subsequent act of the territorial Legislature fixing an amount to be given to the plaintiff as costs repeals this legislation.”

and in the case of *Forno v. Coyle*, 75 F. (2d) 692, at page 696, which was an appeal from the District Court for the Territory of Alaska, Fourth Division, Judge Wilbur for this Court further stated:

“The appellant relies upon a number of cases decided by the Supreme Court of Oregon since 1921. These cases are not in point, since, as the appellant himself observes, they construe section 561 of the Oregon Laws (Olson, 1920), which was almost identical with section 1341 of the Laws

of Alaska, *supra*. Neither section 561 of the Oregon Laws nor section 1341 of the Alaska Laws, however, contains the provision as to 'reasonable' attorney's fees 'to be fixed by the court,' which is found in the act of 1923, *supra*.

"As to the objection that 'no evidence was submitted to the jury' on the question of what was a 'reasonable' attorney's fee, we need only point out that no such evidence was necessary. In *Globe Indemnity Co. v. Sulpho-Saline Bath Co.* (C.C.A. 8), 209 F. 219, 222, certiorari denied, 266 U. S. 606, 45 S. Ct. 92, 69 L. Ed. 464, the court said: 'The further point, in connection with the allowance of this (attorney's) fee, that there was no evidence as to a reasonable amount is not open to examination. If it were, we would be inclined to hold that the court is as good (a) judge of reasonableness of attorney fees for services in that court as any one. Any testimony as to what would be a reasonable fee would be in the nature of expert evidence, and, as such, advisory but not binding upon the court.'

"See, also, *State v. Glass*, 99 Kan. 159, 160 P. 1145, 1146; *Hurni v. Sioux City Stock Yards Co.*, 138 Iowa 475, 114 N.W. 1074, 1076; *Woodward v. Brown*, 119 Cal. 283, 51 P. (2d) 542, 63 Am. St. Rep. 108; *Hotaling v. Monteith*, 128 Cal. 556, 61 P. 95."

The latest case upon this point is *Stanolind Oil & Gas Co. v. Guertzen, et al.*, 100 F. (2d) 299, an appeal from the Montana Courts, wherein Judge Healy, speaking for this Court, held:

“It is conceded that in actions where attorney’s fee is recoverable as a matter of course, the court is permitted to act upon its own knowledge as to the value of the attorney’s services, but it is contended that in the light of the final sentence of the statute, the question of attorney’s fees is converted into an issue of fact upon which evidence must be taken.

“We think the point is without merit. The statute does not require a construction upsetting the generally accepted rule that a judge is permitted to appraise the legal services of counsel without, or independent of, any testimony on the subject. 7 C.J.S. 1093, 1094, Attorney & Client Sec. 191; *Severson v. Barstow*, 63 Pac. (2d) 1022.”

The salient points of the instant case are: Did “Doc” Gordon, defendant, finance the building of the boat and barge “Elaine G” and promise to turn the same over to “Bud” Hager, plaintiff, when the boat and barge had earned enough to pay all the cost of building and operating the same? Did the boat and barge earn enough to pay all costs of building and operating during the 1945 season? Was the boat the property of the plaintiff from the time of building, up to April 20, 1946?

The jury considered these matters, and to the first question answered “Yes.” To the second and third questions the answer was “No.”

If the trial judge had felt that the evidence was preponderately in favor of the plaintiff, he would

have directed a verdict for plaintiff. When the jury has reached a verdict, Courts are reluctant to reverse such verdict unless palpable error has been committed and injustice done by such verdict. The jury had the opportunity, in the instant case, of observing the demeanor of the plaintiff and the defendant and of judging the truth of their statements. The jury's verdict indicated that the defendant's many years of river operation weighed heavily against plaintiff's meager experience. They could judge whether or not the plaintiff stood penniless, when he testified that he was a partner in two saloons at Fairbanks, Alaska.

CONCLUSION.

Appellee contends that the trial of the said cause was fairly conducted, that the instructions of law were proper; that the verdict of the jury was based upon competent legal evidence; that the judgment of the Court allowing an attorney's fee of \$5,000.00 was reasonable; and that the verdict and judgment should be affirmed.

Dated, Fairbanks, Alaska,
October 15, 1948.

Respectfully submitted,
WARREN A. TAYLOR,
Attorney for Appellee.

No. 11,935

IN THE
United States Court of Appeals
For the Ninth Circuit

EARL DAVID FORD,

Appellant,

VS.

UNITED FRUIT COMPANY a corporation,
and UNITED STATES OF AMERICA,

Appellees.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

PRELIMINARY STATEMENT.

The above-entitled cause was heard before the Honorable Louis E. Goodman, Judge of the United States District Court, all witnesses appearing in person and having testified orally. No evidence was heard by way of deposition.

We respectfully suggest to this Honorable Court that this appeal, which involves only issues of fact, is merely an attempt to have the cause heard *de novo* by this Court.

It is not believed that this Court should or will try this case *de novo*. The rule appears to be well settled that the trial court is in a better position to judge the credibility and to give weight to the evidence when all the evidence is adduced from witnesses personally present.

In the case of *Catalina-Arbutus*, 95 Fed. (2d) 283, Judge Denman of this Court stated:

“While this admiralty appeal is a trial de novo, the presumption in favor of the findings of the District Court is at its strongest, since the trial judge heard all the witnesses, save one, and his deposition clearly sustains those heard. *Ernest H. Meyer* (9 CCA), 1936 A.M.C. 1179, 84 Fed. (2d) 496, 501; *Silver Line, et al. v. United States, et al.* (9 CCA), decided January 31, 1938, 1938 A.M.C. 521.”

To the same effect is the case of the *City of New York v. National Bulk Carriers, Inc.*, 138 Fed. (2d) 826, wherein it was said:

“It appears to be impossible to convince the bar that we will disturb findings of fact as seldom in admiralty causes, as in any other. Whether there lingers a notion—never in fact justified—that because an appeal in the admiralty is a new trial, the scope of our review is broader, we cannot know; but over and over again appeals are taken without the least chance of success except by oversetting findings of fact upon disputed evidence. In order to meet this persistence we may in the end find ourselves forced to invoke the penalty provided in Rule 28 (2) of this court.”

To the same effect are many other cases, including:

“*Heranger*”, 101 Fed. (2d) 953 (9 CCA);
City of Cleveland v. McIver, 109 Fed. (2d) 69;
Commercial Molasses Corp. v. New York Tank B. Corp., 114 Fed. (2d) 248;
The S. C. L. No. 9, 114 Fed. (2d) 964.

This Court on June 16, 1947, in the case of *Tawada v. United States*, 162 F. (2d) 615, spoke as follows on this precise point:

“(1) In an appeal in admiralty, where ‘a substantial part of the evidence was heard in open court’, the ‘correct rule’ is that the findings of the trial court ‘are accompanied with a rebuttable presumption of correctness’. *Thomas v. Pacific S.S. Lines, Ltd.*, 9 Cir., 84 F. 2d 506, 507, 508; *The Pennsylvanian*, 9 Cir., 149 F. 2d 478, 481. And, ‘where all of the evidence is heard by the trial judge and the question is one of credibility of witnesses on conflicting testimony, the presumption (that the findings of the District Court are correct) has very great weight.’ ”

This Court succinctly stated the rule in *Stetson v. United States*, 1946 A.M.C. 900, 155 Fed. (2d) 359 (C.C.A. 9th), and in *Bornhurst v. United States*, 1948 A.M.C. 53 (C.C.A. 9th), as follows:

“The findings are supported by substantial evidence, are not clearly erroneous, and hence should not be disturbed.”

The facts in relation to every material issue in the matter at bar were decided by the District Court in favor of appellees and against appellant.

Should this Court determine, in its wisdom, to hear this matter *de novo*, we submit the following in reply to the appellant's brief.

**STATEMENT OF FACTS AND EVIDENCE
RELATING THERETO.**

At the time of the accident, the subject matter of this proceeding, and on April 28, 1945, the SS "SEA PERCH" was loading some 2000 troops at Espiritos Santos, in the New Hebrides Islands. (Ap. 42, 43, 231.) Appellant, who was off duty at the time, seated himself in a most dangerous position (Ap. 21) on the vessel's rail on the main deck about 'midships, on a ¾-inch guard rail. He was facing outboard with his feet overboard and outside the vessel's railing. (Ap. 64, 193-195.) In this position, appellant was watching the embarkation of the above referred to troops.

During some of the time in which appellant remained so seated he claims he was holding onto a stanchion with one hand, but just before his fall he was not holding onto anything, nor supporting himself in any way. (Ap. 195, 196.) He testified, as did others, that the passageway between the rail on which he was sitting and the deck house was fairly congested with soldiers and not members of the crew. (Ap. 151, 200, 208.)

About fifteen minutes before Ford fell from the vessel's rail to the dock, 30 or 35 feet below (Ap. 163) the vessel's first assistant engineer, Mr. Falk, while passing by warned Ford of the danger of sitting on the vessel's rail, which he was then doing, and ordered him to get off, which order Ford ignored (Ap. 227):

Q. (By the Court). You have a distinct recollection, you say, of this officer telling the——

A. (interrupting). I do.

Q. —fellow to get off the rail, telling Ford to get off the rail, warning him?

A. Yes.

Q. Is there any doubt in your mind about that?

A. None whatever.

There was some evidence that appellant was jostled by two men who were engaged in some harmless horseplay, both of whom were off duty at the time. (Ap. 115.) The trial court determined that appellant had placed himself in such a "most dangerous position" that any jostling by soldiers or others who were passing in the passageway, whether engaged in horseplay or not, could have caused the accident to appellant. (Ap. 21, 22.)

There was the usual horseplay aboard the SS "SEA PERCH", as aboard any other vessel. Such activities, however, aboard the concerned vessel were not excessive and were the same as encountered on any vessel. (Ap. 147-149, 208.) The appellant himself admitted that horseplay is common on all ships (Ap. 118) and the amount of such was described by other witnesses as being the average amount on any ship of that size. (Ap. 118.) The complained of horseplay had been going on only intermittently and not continuously and was variously estimated by the different witnesses as lasting from a "matter of seconds" to longer periods involving minutes (Ap. 228):

Q. You say you only saw the boys scuffling for a few seconds before Ford was thrown off?

A. Yes.

Q. How long were you there?

A. Half hour to 45 minutes.

The only evidence that any officer of the ship knew that appellant was seated on the vessel's rail in his perilous position was the testimony of Donald Fraser that he heard the first assistant engineer, Mr. Falk, order the appellant off the rail. There is no evidence that any officer of the ship saw the scuffling between Clarke and Huff or that Clarke and Huff, or either of them, saw the appellant or the precarious and dangerous position in which he had placed himself. Some of the appellant's witnesses testified that the vessel's first officer was on the landing to which the gangway leads, some 12 feet or more from where Ford had placed himself on the rail at the time of the accident. (Ap. 207.) There was no proof or evidence, however, of any kind that the first mate, if he was so stationed, knew where Ford was seated or that he saw him, nor is there any evidence of any kind to indicate that the first mate knew that the horseplay allegedly engaged in by Clarke and Huff was going on or that it came to his attention. Other witnesses who were present at the scene, as is admitted by appellant on page 5 of his brief, testified that they did not see the first mate at the place appellant claimed he was stationed. There was other evidence given by the third mate, who testified that loading time was a particularly busy one for the first mate and that he was all over the vessel at this time, with quite a bit of paper work and conferences with the transport commander. (Ap. 232.)

Nowhere in the evidence is there any indication of any injury ever having resulted from the innocent and

usual amount of horseplay as experienced aboard this and all vessels. There was not at any time adduced any evidence in support of appellant's theory that horseplay is a dangerous practice likely to result in injury to the participants or others. On the contrary, the evidence is that innocent horseplay is indulged in on all vessels—the longer the voyage, the more horseplay.

The appellant's failure to cite references to the testimony contained in the apostles, as contained in his "statement of the case", makes it impossible to answer him verbatim or to check the veracity of his statements.

ANSWER TO ARGUMENT OF APPELLANT.

Under this title appellant asserts four propositions which will be answered in the order as written.

I.

Appellant's first argument is to the effect that the Jones Act should be liberally construed. While we are willing to concede such rule and have no quarrel with the cases cited under this proposition, we respectfully point out to this Court that the cases are not even remotely in point with the facts in this matter. For example, the case of *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, cited by appellant, does nothing other than to lay down the rule as to the proofs required to set aside a seaman's release.

II.

The appellant devotes many pages of his brief to the case of *Sundberg v. Washington Fish & Oyster Co.*, 138 Fed. (2d) 801 (C.C.A., 9th) decided on November 8, 1943.

We do not believe that the case of *Sundberg v. Washington Fish & Oyster Co.* stands for the proposition claimed, or that it is in point. This Court held that the libelant, who was shot, was acting in the course of his employment while off duty by being on deck and pointing out sea lions to the other persons on board, but this Court did not hold that the member of the crew who shot the libelant was acting in the course of his employment and thusly bind the master. The basis upon which liability was fastened was the master's full knowledge of and his acquiescence in the dangerous practice of firing rifles from the deck of the vessel. The master had warned the crew to put the guns away while in Canadian waters for "we might get into trouble," but no order was given to desist from the known very dangerous practice of shooting guns from the deck of the vessel while in other waters, where the injury was suffered. After leaving Canadian waters, "*with full knowledge of the master*, several shots a day were fired, generally from the rail or from four or six feet inside the rail. On the fifth day no shooting had taken place until after the appellant had called to Taylor to come on deck to watch the play of some sea lions." Thereafter the libelant was shot. Following the accident, the master

admitted his fault, stating, "So you got it. That is too bad. *I knew I should have told the boys about those guns*; but you know how it is, I hated to do anything." (Italics ours.)

Thus we observe that in the *Sundberg* case, *supra*:

1. There was knowledge on the part of the master of the extremely dangerous practice of firing guns from the vessel's deck.

2. The master, in spite of this knowledge permitted the practice to continue unabated.

3. He knew the practice was likely to result in injury.

4. Such activities and practice were dangerous *per se*.

In the case at bar, as indicated in our Statement of Facts and Evidence Relating Thereto, where supporting portions of the record are cited, the evidence clearly establishes that:

1. There was no showing that innocent friendly horseplay engaged in by the crew on a long voyage was "known to be dangerous" and the evidence shows to the contrary, no injury ever having resulted therefrom.

2. There was only the usual amount of horseplay aboard the "SEA PERCH" as is found aboard every other vessel.

3. There was no showing of any kind that the horseplay engaged in aboard the "SEA PERCH" was likely to result in injury or harm.

4. There was no showing, and it is a fact that innocent horseplay is not dangerous *per se*.

5. The complained of horseplay was not continuous but had only been going on intermittently and lasting "a matter of seconds."

6. There is no evidence that the complained of horseplay was known to the first officer, who was claimed by *some* of the witnesses to have been at the gangplank or that he saw or knew of the alleged scuffling.

7. The appellant had been warned of the danger and ordered off the rail before he fell.

We respectfully submit that the permitting of the discharging of firearms is a very different thing from the permitting of innocent horseplay amongst men who are confined to a vessel over a period of months which is one of the traditional rights of sailors.

III.

While we likewise concede that a ship owner is under an obligation to provide a seaworthy vessel as well as a safe place to work, we are sincere in our belief that the ship owner has not failed in either of these particulars in this matter. None of the cases cited by appellant even approaches the facts of this matter as applied to the law enunciated, nor do we concede that the law laid down in the cited cases is applicable to the instant matter. We briefly comment on the following cases, each of which is relied on by appellant.

The Waco, 3 Fed. (2d) 476, was based upon an issue of fact, as is the instant matter, and the court merely held that the libellant had sustained the burden of proof in showing there was negligence on the part of the ship in failing to provide a safe and proper block and fall for the purpose of removing a heavy boiler cover in the engine room of the vessel.

Christopher v. Grueby, 40 Fed. (2d) 8, involved the use of an open gasoline can which constituted a fire hazard when the engines were running and a lack of a fire extinguisher outside the engine room of said vessel.

In the case of *Krey v. U.S.A.*, 123 Fed. (2d) 1008, there was involved an injury suffered in a shower which was not equipped with hand rails and which likewise had a slippery floor and was thusly made unsafe.

The case of *The Secandbee*, 102 Fed. (2d) 577, involved injuries which were caused as a result of two negligent conditions: the floor of the boiler room on which the air pump rested was defective and there were no guards, rails, barriers or other safety devices around the air pump, which had moving parts.

In the *H. A. Scandrett* case, 87 Fed. (2d) 708, a defective door knob was the cause of the injury.

The Dora, 28 Fed. S. 659, involved the lack of lights and the lack of a hand railing in a dark passageway.

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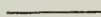
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The Dora, 28 Fed. S. 659, involved the lack of lights and the lack of a hand railing in a dark passageway.

As all appellant seamen do, this appellant has cited the case of *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, which as this Court well knows, involved a broken and defective shackle.

The appellant next cites the case of *The Rolph*, 299 Fed. 52 (C.C.A. 9th) which merely holds "that a ship is not properly equipped for a voyage where the mate is a man known to be of most brutal and inhuman nature, one known to give vent to a wicked disposition by violent, cruel and uncalled for assaults on sailors." The holding in *The Rolph* could not possibly be determinative of the case at bar.

Any other authorities cited by the appellant that we have failed to comment upon are, we believe, not in point and unworthy of consideration.



IV.

Appellant's fourth and last argument is based upon the proposition that where a harmful practice or dangerous condition is known to exist or allowed to continue, the master is under an obligation to remedy the difficulty or stop the practice. As has heretofore been pointed out, there is no suggestion whatever in the record that the friendly horseplay occasionally indulged in aboard the "SEA PERCH" had ever resulted in harm or injury. There was no more than the usual amount of such horseplay which is experienced on all vessels, and we believe it to be a reasonable conclusion that there would be something

wrong with the crew of any vessel that did not engage in some horseplay. The record clearly shows that on all vessels the longer the voyage, the more the horseplay. This is a normal and human tendency and anyone who thinks that such horseplay could be effectively stopped, should there be such a desire, does not know life at sea or the men that sail our ships.

As has been previously pointed out, there is not one iota of testimony that the mate or any other officer of the vessel knew that the scuffling allegedly going on between Huff and Clarke was taking place. The appellant himself, who was a good deal closer to the alleged scufflers than was the mate, did not know of it. Furthermore, there is not one iota of evidence to show or prove that either Huff or Clarke knew of the precarious position in which the appellant had deliberately placed himself, contrary to orders.

The appellant admits on page 30 of his brief that "the courts have established as one of the prerequisites that the employer must have acquired knowledge through its officers of the unsafe conditions." He then proceeds to state there was some testimony that First Mate Schaefer was on the gangplank platform for some forty-five minutes prior to the accident. Other witnesses who were there testified that they did not see the mate, and the third mate testified that he had a number of duties about the vessel. At best, the most that can be said for appellant's position is that there was a conflict of the testimony

in this regard and the trial court, before whom all the witnesses personally appeared and testified, chose to believe the evidence of the appellees.

The case of *Kochler v. Presque-Isle Transportation Co.*, 141 Fed. (2d) 490, cited by appellant, is another case of an assault committed by an assaulter who was a person of vicious and belligerent character and likely to inflict bodily harm on other members of the crew, and such facts were known to the officers of the ship. A serious assault had been made on the libelant in the presence of one of the ship's officers, and there was no question but that the belligerent and harmful proclivities of the assaulter were known to the ship's officers.

In the case of *Kyriakos v. Goulandris*, 151 Fed. (2d) 132, also relied on by appellant, the court found Bouritis, the assaulting seaman, to be a marijuana addict. He had threatened the libelant on many occasions and the court found that the master knew, or at least should have known, the assaulter was a man of vicious and violent character and irrational. The case is replete with instances where the libelant had been repeatedly threatened and abused, he previously having appealed to the master for help and protection which was denied him.

We cannot see why the case of *McGee v. Sinclair Refining Co.*, 47 Fed. Supp. 912, which appellant has cited, is in any way here controlling. The case involved the practice of permitting a vicious dog to roam about the decks of the vessel unfettered in

any way. The court took care to point out that the dogs aboard the ship prior to biting the libelant "had snapped at members of the crew and had bitten an able-bodied seaman, and also that seamen were scared at night by reason of them when they were taking over the wheel; that the sailors made complaint about the dogs and their conduct aboard the ship on at least two occasions, and that the dogs on occasion would bite." The court held that the foregoing facts constituted notice and knowledge of the likelihood of the dogs' seriously injuring someone.

APPELLEES' ARGUMENT.

As the appellant cites a large number of assault cases in support of his position, we think it only appropriate to point out that while in some cases liability can be imposed upon the ship owners on the theory of *known* vicious, brutal and violent characteristics and propensities of the assaulter, we believe it equally clear that such facts must be affirmatively shown or the assault must be committed in the furtherance of the ship's discipline or the ship's business.

In the case of *Yukes v Globe S.S. Corporation*, 107 Fed. (2d) 888, the court denied recovery to the appellant because the assault involved was not in the furtherance of the ship's business. The court stated:

"The difficulty with the appellant's case is that there is nothing to connect Cope's assault upon

him with discipline or the ship's business, or to bring it within the actual or constructive scope of his authority."

The court further held that the assertion of the assaulter that "I am an officer" added nothing to the case. Thus, it is clear that all assaults are not compensable and recovery cannot always be had against the ship owner as is claimed by appellant.

In *Nelson v. American-West African Line, Inc.*, 86 Fed. (2d) 730 (C.C.A. 2nd), it was held that in order to permit recovery by a seaman who was assaulted in bed by a drunken boatswain, before recovery could be allowed the boatswain must be determined to have acted within the scope of his authority in the furtherance of the ship's business.

It is obvious that the facts of the instant case do not bring us under the law laid down by any of the foregoing cases.

While the vicious propensity rule applies with equal effect to officer and fellow seamen, we believe it clear that in assaults committed by fellow seamen of equal rank, no vicious propensities having been shown, liability does not attach to the vessel. Such assaults to be compensable in damages against the ship owner must be committed by superior officers in furtherance of ship's business.

In the case of *Lykes Bros. S.S. Co. v. Grubaugh*, 128 Fed. (2d) 387 (C.C.A. 5th), at page 391, the court fully considers the question of the shipowner's

responsibility in "assault" cases. This excellently considered opinion states as follows:

"The law governing the responsibility of the master for an injury from a beating administered by one employee to another, as well stated in *Medlin Milling Co. v. Boutwell*, 104 Tex. 87, 133 S. W. 1042, 34 L.R.A., N. S. 109, and *Davis v. Green*, 260 U. S. 349, 43 S. Ct. 123, 67 L. Ed. 299, is that under the doctrine of respondeat superior there is no liability for a wrongful assault committed by one employee on another unless the assault is committed, whether wisely or unwisely, in furtherance of or in an attempt to further the master's business or in other words in connection with some act which an assaulter is authorized to do for the master. In any case where the act is merely a wanton and wilful act done to satisfy the temper or spite of the employee, the master is not liable. In *Jamison v. Encarnacion*, 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082, and *Alpha Steamship Corp. v. Cain*, 281 U. S. 642, 50 S. Ct. 443, 74 L. Ed. 1086, applying to assaults on shipboard, the rule of the *Green* case, the Supreme Court declares that the employer may be liable under the Jones Act only when the assault is committed by one having authority over the person assaulted and then only when it is committed in the course of the conduct of the master's business. In each of those cases the assault was by a superior officer upon a subordinate employee whom the assailant had the power and authority to direct, control and discipline. No case has held a steamship company liable for an assault committed by a subordinate employee upon his superior or by the head of one department upon the head or

an employee of another department over whom the assailant has no authority or direction or control. None has held the master liable where as here the assault occurred as the result of anger over matters having nothing to do with the exercise, over the assailed, of authority delegated by the master to the assailant in the discharge of duties with which the master had charged him. It is the appellant's position that the case fails here both because the engineer had no authority or control over the steward and because if he had, the evidence not only wholly fails to establish that the assault was committed in attempting to carry out the master's business but on the contrary it affirmatively shows that it was a personal quarrel to vent the drunken spleen of the engineer."

The foregoing case was reconsidered on rehearing in 130 Fed. (2d) 25, and was affirmed; additionally, maintenance was awarded. The opinion was not otherwise modified.

This same subject was given extensive treatment by the Second Circuit Court of Appeals in the case of *Bonsalem v. Byron S.S. Co.*, 50 Fed. (2d) 114 (C.C.A. 2nd). At page 115, the court states as follows:

"The ship or shipowner is not liable for injuries received by a seaman from an assault committed outside the scope of the employment of those on the vessel who are alleged to have assaulted him. This appellee was assaulted without provocation, and the assault was not committed by any officer of the vessel in furtherance of the appellant's business. The appellant did not authorize the of-

ficers of the ship to beat and assault him without cause or for a reason unconnected with the navigation of the ship.”

To the same effect, see *Pittsburgh S.S. Co. v. Scott*, 159 Fed. (2d) 373, (C.C.A. 6th) (1947), at page 376:

“A willful assault perpetrated ‘to satisfy the temper or spite of the employee’, not done in an attempt to further the employer’s business, does not render the master liable for his servant’s wanton acts.”

Lykes Bros. S.S. Co. v. Grubaugh, 5 Cir., 128 Fed. (2d) 387.

See also *Brailas v. Shepard S.S. Co.*, 152 Fed. (2d) 849 (C.C.A. 2nd), wherein the applicable law is carefully set forth as follows:

“* * * It is well established that a master will not be liable for the negligent acts of his servant unless they are performed in the course of or in furtherance of the master’s business; the fact that the injury is done during the continuance of employment is not enough. *Davis v. Green*, 260 U. S. 349, 43 S. Ct. 123, 67 L. Ed. 299; *Bonsalem v. Byron S.S. Co.*, 2 Cir. 50 Fed. (2d) 114; *Lykes Bros. S.S. Co. v. Grubaugh*, 5 Cir., 128 Fed. (2d) 387, modified on rehearing 5 Cir., 130 Fed. (2d) 25.

“* * * Even assuming, however, as plaintiff contends, that Dolanides stabbed him in an effort to regain possession of his position at the throttle, the defendant company cannot be held responsible for Dolanides’ act. An assistant engineer can hardly be said to act in furtherance of his

master's business when he assaults the chief engineer as the latter attempts to take control at a time of emergency. The case on its facts is clearly distinguishable from cases relied on by the plaintiff where a superior officer injured a seaman in the act of prodding him to work. *Jamison v. Encarnacion*, 281 U.S. 635, 50 S. Ct. 440, 74 L. Ed. 1082; *Alpha S.S. Corp v. Cain*, 281 U.S. 642, 50 S. Ct. 443, 74 L. Ed. 1086; *Nelson v. American-West African Line*, 2 Cir., 86 Fed (2d) 730, certiorari denied *American-West African Line v. Nelson*, 300 U. S. 665, 57 S. Ct. 509, 81 L. Ed. 873! Hence the court committed no error in refusing to submit this issue to the jury and in refusing plaintiff's requests to charge based upon the contrary theory."

By no stretch of the imagination can the case at bar be held to be within the foregoing rules of law. As we have heretofore shown this Court in replying to appellant's arguments, the horseplay indulged in aboard the "SEA PERCH" (a) was not dangerous; (b) had never resulted in injury; (c) there was only the usual amount aboard the "SEA PERCH" as aboard any other vessel; (d) such activities were not excessive, the appellant himself admitting that horseplay is common on all ships; (e) the complained of horseplay was not continuous but had only been going on intermittently and lasting from "a matter of seconds" to longer periods involving minutes. Nor was such horseplay dangerous *per se* or of a vicious, cruel or inhuman nature. As previously commented, we question whether a ship has ever sailed whose crew did not engage in some horseplay.

The record will show that the appellant placed himself in a position which was most likely to result in serious injury to himself. (Ap. 64, 193-195.) We know of no more dangerous position in which he could have placed himself aboard the vessel under the circumstances then existing, nor one more likely to result in his injury. He sat on the vessel's rail facing outboard with his feet over the vessel's side. The rail on which he was perched was a $\frac{3}{4}$ -inch pipe railing. It is difficult to describe the recklessness of his act. In assuming the position which he did it was almost certain that serious injury would result to him. It is nothing short of incredible that appellant persisted in remaining in the described precarious and frightfully dangerous position even after having been ordered away from the rail by one of the vessel's officers, whose order he did not obey.

Appellant's arguments that the vessel's officers permitted him to remain in the described position by not ordering him off in view of the evidence, are ridiculous and absurd, and we do not believe will be seriously regarded by this Court. That the appellant was under a duty to use all reasonable care to prevent injury to himself cannot be successfully challenged. The appellant not only failed to use any care whatever for his own safety but on the contrary placed himself in a most dangerous position. Certainly no other position could be more calculated or certain to result in his injury.

The language of this Court in the case of *Drain v. Shipowners & Merchants Towboat Co., Ltd., et al*

149 Fed. (2d) 845, 1945 A.M.C. 892, is, we believe, authoritative. The injury occurred to Drain when in approaching the pier he stood on the guard rail of the tug, outside of the rail, ready to take a mooring line to the pier. He was caught between the side of the tug and a hanging fender as the tug swung toward the pier, and his leg was broken and crushed. This Court in denying a recovery held that appellant was not given an unsafe place to work and was not ordered into an unsafe place, and that appellees warned Drain when he took a post of danger and he failed to heed the warning.

Also see *Wallace v. Delaware River Ferry Co. of New Jersey*, 1943 A.M.C. 1203.

In the case of *Vileski v. Pacific-Atlantic S.S. Co.*, 163 Fed. (2d) 553 (C.C.A. 9th), decided by this Court on August 29, 1947, the libelant was injured while repairing certain relief valves over the vessel's boilers, and in working over these valves the libelant was standing on a hand rail, claim being made that the vessel had failed to provide a staging. The court stated:

"It is thus clear that the district court was entitled to infer that the only negligence causatively contributing to libelant's injury was in libelant in choosing to work on the rail, installed for an entirely different purpose, and in failing in his duty to install the convenient staging. *Drain v. Shipowners & Merchants Towboat Co.*, 9 Cir., 149 Fed. (2d) 845, 846.

"The hand rail for use in heavy seas is no more defective or dangerous per se than are the ship's

sides to keep out such seas. As well could it be said of a deck crew, ordered to paint the ship's sides, who chose to do so hanging by individual ropes lashed to the ship's rail instead of using the available customary staging and rigging for that purpose, that they were ordered to work in a dangerous place."

A more recent case decided by this Court and on all fours with the case at bar is that of *Bornhurst v. U.S.A.*, 164 Fed. (2d) 789, 1948 A.M.C. 53 (C.C.A. 9th), certiorari denied 92 L. Ed. 700. This Court denied recovery to another libellant who was seriously injured while satisfying his own curiosity. Bornhurst's personal negligence certainly was nominal compared to that of appellant herein. This Court, affirming the District Court and denying recovery, stated:

"The court further found * * * 'The libellant, voluntarily and not in the performance of any work or duty which he was required to do or perform, placed his hands on the edge of said tank and leaned forward, supporting his weight by his hands, for the purpose of examining the inside of said tank. Said acts on the part of the libellant were prompted solely and exclusively by the libellant's curiosity, and the libellant sustained injury to his hands when said tank top suddenly descended and pinched the libellant's fingers between the under surface thereof and the rim of said tank. * * * The libellant had no duties of any kind to perform at or near the tank top, and if the libellant had continued in the performance of his regular duties, he would not have been injured. The tank top * * * was a heavy, movable

and moving device, weighing approximately 600 pounds, and the fact that it was a heavy, movable and moving device was obvious to any person observing the same, and the libelant had knowledge that two other seamen were performing work with reference to said tank top.'

"The findings are supported by substantial evidence, are not clearly erroneous and hence should not be disturbed. Upon the facts found, the court correctly concluded that appellant was not entitled to recover, and that the libel should be dismissed, with costs to appellee." (Underscoring ours.)

This Court also held on December 16, 1947, in the case of *Meintsma v. U.S.A.*, 164 Fed. (2d) 976, 1948 A.M.C. 144 (C.C.A. 9th), that the libelant, who jumped from a gangplank instead of requesting that it be lowered, "assumed all risk of injury."

In *Paul v. U.S.A.*, 54 Fed. Supp. 60, the court held that libelant took a chance on a stormy night to use a gangplank which a watchman had warned was unsafe. The libelant was not on duty at the time and there was no need of haste. The court made the following pertinent observations of the law involved:

"(2) Conceding, for the present purposes, that libelant was so faced by the consequences of negligence, he voluntarily exposed himself to, and assumed the risk of, such known and appreciated dangerous consequences; not only did he take no precautions whatever to avoid such ill results to himself as might reasonably have been anticipated would come to him if and when he were compelled to board the vessel in line of duty with

such consequences still existent, but he deliberately flirted with the dangerous situation, and although he was otherwise in no hurry to board the vessel, was not under compulsion to return to the ship from his shore leave until eight o'clock the succeeding morning, was engaged in no service for his employer and was under no orders whatever, he elected 'to take a chance,' as he, himself, testified; he gambled with the known danger, lost his throw, and now seeks to have himself indemnified for his foolhardiness, if, as a matter of fact, the proximate cause of all the ills which he represents himself to have borne since the night of February 16th, 1926, until the filing of his suit on December 29, 1932, were actually found to be his fall from the gangway extension.

“(3) By his own negligence libelant brought upon himself whatever injury he suffered and he cannot be permitted, in justice, to recover damages for it. One cannot deliberately incur an obvious risk of personal injury from a dangerous situation which he charges to have been created by the negligence of another,—when he is under neither compulsion nor necessity to place himself within range of the operative influence of such situation and may rely upon preventive measures being taken to dispose of the inherent danger before he need do so,—and then be heard to contend that he should be permitted to recover from the author of the danger such damages as he sustained by reason of ensuing injury. *Baltimore & Potomac R.R. Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506 (1877); 38 Am. Jur. (1941) ‘Negligence,’ § 171, pp. 845-846.”

We believe this case strikingly similar to the facts now before this Honorable Court.

In the case of *Jackson v. Pittsburgh S.S. Co.*, 131 Fed. (2d) 668 (C.C.A. 6th), the court denied recovery to a seaman who jumped ashore in the absence of a ladder or gangplank, holding that when he leaped from the ship under circumstances where injury might reasonably be expected to result, he acted on his own volition, in the pursuit of his personal affairs, and was not injured "in the service of the ship." The court in denying recovery for both *damages, maintenance and cure* in the *Jackson* case made the following very pertinent observations, which we believe apply with equal force to appellant's claim:

"(2-4) While maritime law imposes a duty upon the owners of a vessel to care for a seaman who falls sick or is injured in the service of his ship to the extent of his maintenance, cure and wages (*The Osceola*, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760), in order to recover, an injured seaman must have acted without gross negligence or misconduct (*Olsen v. Whitney*, D. C., 109 Fed. 80), and his own wilful wrong-doing gives him no rights against the vessel or her owners (*The S.S. Berwindglen*, 1 Cir., 88 Fed. (2d) 125). The phrase 'in the service of the ship' does not extend the obligation of the vessel or its owners to injuries received by a seaman while engaged in his personal affairs. *Collins v. Dollar S.S. Lines, Inc.*, D.C. S.D. N.Y., 23 Fed. Supp. 395, 397. When a seaman, by his own volition, creates an extraneous circumstance, he brings about an intervening cause that directly affects his relation

to his employers and to the ship. He is responsible for such intervening cause if it consists of his own wilful misconduct, is something which is done in pursuance of some private avocation or business, or grows out of relations unconnected with the service or is not the logical incident of duty in the service. *Th Osceola*, supra; *Meyer v. Dollar S.S. Line*, 9 Cir., 49 Fed. (2d) 1002."

We believe it to be elementary that the well known "skylarking" or "horseplay" rule exempts an employer from liability for injuries where a person other than those engaged in the horseplay or scuffling may suffer injury therefrom. 35 Amer. Juris. 630. The rule is well stated as follows:

"§ 201. *Injury by Act of Another Employee in Sport or Play*—It is well settled that an employer is not to be held liable at common law for injuries inflicted upon an employee in sport, or as a result of 'skylarking' or 'horseplay,' by other employees not acting in the performance of any duty owing to the master, in the absence of anything to show that the injury was authorized by the employer or anything to show that the injury amounted to a violation by the employer of some duty owing to the injured employee."

Also see 39 *Corpus Juris* 546 for the same rule.

The rule being so well known and established, we do not feel it requires any further support.

In *Finnemore v. Alaska Steamship Company*, supra, 13 Wn. (2d) 276, 124 P. (2d) 956, the court quoted with approval from *Pittsburgh Steamship Co. v. Palo*,

supra, 64 Fed. (2d) 198. As a preliminary to the quotation, the Washington court said:

“It is also the well established rule that no act or omission of the shipowner may be considered negligent unless the danger of injury was reasonably foreseeable.”

APPELLANT'S CLAIM FOR MAINTENANCE.

The trial court did not err in refusing further maintenance. The record shows conclusively that the appellant received all wages due him and maintenance up until December 5, 1946, at the rate of \$3.50 per day. (Ap. 189-190.) No evidence of any kind was offered by appellant as to what appellant's “maintenance” cost him, and appellant's counsel in open court stated that it was up to the court to determine whether \$3.50 per day was a reasonable amount. (Ap. 184.) After some discussion with respect to the amount of any maintenance due, past and future, appellant's counsel stated:

“Mr. Ames: Well, I won't press it.” (Ap. 187.)

The medical reports contained in the Marine Hospital's file, Exhibit 2, shows that appellant was discharged as fit for light duty on December 5, 1946, which is the date to which his maintenance was voluntarily paid him. He actually returned to work on December 21, 1946 (Ap. 181) and presumably between December 5 and December 21 was looking for em-

ployment, which the record discloses he commenced on December 21.

We respectfully submit that the record is devoid of any evidence entitling appellant to any further maintenance.

CONCLUSION.

We respectfully submit that the trial court, having heard all witnesses testify in person before it and having resolved all material allegations in favor of the appellees and against the appellant, the decree should for the reasons previously stated be affirmed.

Dated, San Francisco, California,
October 4, 1948.

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ORIGINAL

Docketed

No. 11936

In The
United States Circuit Court of Appeals
For the Ninth Circuit

WILLAPOINT OYSTERS, INC., *Petitioner*

vs.

OSCAR R. EWING, Administrator, and J. DONALD
KINGSLEY, Acting Administrator, FEDERAL
SECURITY AGENCY, FOOD AND DRUG
ADMINISTRATION, *Respondents*.

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FILED

OCT 25 1948

Dated: October 25, 1948.

PAUL P. O'BRIEN,

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Allen, Harold L.—Seafoods Supervisor, Food and Drug Administration, New Orleans, Louisiana (R. 128).	R. 128-139; R. 460-461; R. 464-465; R. 491-492; R. 646-648; R. 658.	
Callaway, Joseph—Secretary, Food Standards Committee, Food and Drug Administration; with Department since 1914, “ <i>continuously engaged in work which might be called enforcement work</i> ” (R. 13-14).	R. 13-91; 477-480; 481- 491; 654; 657; 682; 686-7; 690; 693; 694- 695.	Ex. 3. 4, 5, 6, 7, 8.
Ewing, Oscar, R.—Federal Security Administrator.		
Goding, James B.—Presiding Officer, Federal Security Agency.		Ex. 1 and 2.
Rowe, Sumner C.—Food and Drug Administration; with Department since 1923 (R. 92).	R. 92-128; 142- 150; 481; 627- 646; 653; 654; 659-667; 672-4; 681; 683; 689; 691; 693; 697-9.	Ex. 9, 10, 11, 12, and 21.
Warren, Clyde Crabill — Counsel, Federal Security Agency.		
<i>For the Southern oyster industry:</i>		
Carriere, Charles M.—Vice President and General Manager, Canned Shrimp and Oyster Dept., Wesson Oil Company (R. 447-c-448).	R. 447-c-460; 461- 464; 465-477; 493-513.	
Castle, Howard B.—Attorney appearing for National Cannery Association, Gulf - South Atlantic Oyster Packers Association, and Pacific Oyster Growers Association (R. 6).		

WITNESSES AND EXHIBITS BEFORE ADMINISTRATOR *xii*

- | | | |
|---|---|-----------------------|
| Holcombe, Thomas B.—Indian Ridge Canning Company, Inc., and Vice President, Gulf-South Oyster Canners Ass'n., Houma, Louisiana (R. 549). | R. 549-563. | |
| Jastremski, John—President, Pelican Canned Oyster Company (R. 513). | R. 513-522. | |
| Sewell, Reginald H. — representing DeJean Packing Company and Biloxi Seafood Shippers Ass'n. (an organization of 17 packers from that area) Biloxi, Miss. (R. 543). | R. 543-549. | |
| <i>For the Western oyster industry:</i> | | |
| Bailey, R. H.—President, Willapoint Oysters, Inc., Seattle, Washington (R. 522). | R. 522-534. | Ex. 18. |
| Barnett, Vinton—Coast Oyster Company, formerly with Federal State Inspection Service (R. 410). | R. 410-435. | |
| Bendiksen, Erling H.—Owner, E. H. Bendiksen Company, Ocean Park, Washington (R. 435). | R. 435-447b. | |
| Castle, Howard B.—see above. | | |
| Clough, Dr. Ray W.—Chemist, Ass't. Director, N.W. Branch, National Canners Ass'n. Formerly Ass't. Chemist, Bureau of Chemistry, Food and Drug Administration (R. 196). | R. 196-279;
564-608; 654-657; 667-668;
674-675; 675-677; 678; 680;
681; 682; 683-684; 688; 690;
691; 692; 693;
695-696; 699-701. | Ex. 14,
19 and 20. |
| Esveltdt, George D.—Cannery Superintendent, E. H. Bendiksen Company, South Bend, Washington. Formerly biologist, Washington State Department of Fisheries (R. 190-191). | R. 190-196;
279-348; 349-410; 654; 668-672; 675; 677;
679; 681; 683;
691; 692; 693. | Ex. 15,
16 and 17. |
| Kincaid, Dr. Trevor—Chairman, Department of Zoology, University of Washington, Seattle, Washington (R. 154). | R. 154-190. | Ex. 13. |

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Steele, E. N.—Attorney appearing for Pacific Coast Oyster Growers Association (R. 2).

Wiegardt, John L.—Wiegardt Brothers, oyster packers, Ocean Park, Washington (R. 150). R. 150-153; 608-627; 685.

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For the Administrator:

Callaway, Joseph—see above.	R. 797-834; 882-981; 983- 1011; 1033- 1034; 1160-1162.	Ex. 33.
Goding, James B.—see above.		Ex. 22, 23 and 24.
Goodrich, William W.—General Counsel, Food and Drug Division, Federal Security Agency (R. 702).		Ex. 31.
Hansen, Douglas C.—Inspector, Seattle Station, Food and Drug Administration (R. 843).	R. 843-882; 1050-1128.	
Kingsley, J. Donald—Acting Administrator, Federal Security Agency.		
Lovejoy, Rodney D.—Chemist, Food and Drug Administration (R. 1011).	R. 1011-1013.	
Nicholson, James Frank — Photographer and microanalyst, Food and Drug Administration (R. 834).	R. 834-839.	Ex. 32.
Rowe, Sumner C.—see above.	R. 1013-1014.	
Steagall, Edward F.—Chemist, Food and Drug Administration (R. 1015).	R. 1015-1016.	
Warren, Clyde Crabill—see above.		Ex. 35 and 36.

For the Southern oyster industry:

Strasburger, Lawrence W.—Appearing for Gulf-South Atlantic Packers Association and National Shrimp Canners Ass'n., New Orleans, La. (R. 702, 1035).	R. 1035-1049.	Ex. 34.
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For the Western oyster industry:

Bailey, R. H.—see above.

R. 713-795;
1017-1030;
1129-1160;
1162-1164.

Steele, E. N.—Attorney for E. H. Bendiksen Company, South Bend, Washington, and Wiegardt Brothers, Ocean Park, Washington (R. 702).

Ex. 37, 38, 39,
40, 41, 42, 43,
and 44.
(Ex. 39, 40 and
41 rejected.)
(Ex. 43 and 44
identified only.

Stephan, Albert E.—Attorney for Willapoint Oysters, Inc., Seattle, Washington (R. 702).

Ex. 25, 26
27, 28, 29, and
30.

Index to Affiants and Affidavits Received at July, 1948, Hearings

Charlton, Dr. David B.—Graduate chemist; Master's degree and Doctor's degree of bacteriology and chemistry; formerly assistant bacteriologist, City of Portland; instructor in bacteriology, Oregon State College; and for the past 14 years owner of Charlton Laboratories, an analytical and consulting laboratory, including physical testing and food and sanitary bacteriology.

Ex. 28, 30.

Clough, Dr. Ray W.—see above.

Ex. 27.

Hayes, Lynn—Plant Manager of Willapoint Oysters, Inc.

Ex. 25.

Hayes, Verne—Vice President, Willapoint Oysters, Inc.

Ex. 26.

Kirkwood, Florence—Ass't Director of Mary Cullen's Cottage (Oregon Journal Home Economics Dept., Portland, Oregon); graduate of Oregon State College with a Foods major; past experience managing restaurants. (App. E, pp. 43, 48, 49).

Ex. 28 (Supp.
App. B).

Kniseley, J. M.—Manager, Laucks Laboratories, Inc., Seattle, Washington (App. E, pp. 49-52).

Ex. 29.

- | | |
|--|------------------------|
| Laughton, Cathrine C.—Director, Mary Cullen's Cottage (Oregon Journal Home Economics Dept., Portland, Oregon, with complete facilities for preparing, cooking, and serving food); member of Food Panel making Consumer Acceptance Test of canned oysters (App. E, pp. 41-4, 47, 49). | Ex. 28 (Supp. App. B). |
| Mathews, Crystal—Housewife; and employee of Oregon Journal (App. E, p. 43, 48, 50). | Ex. 28 (Supp. App. B). |
| McPhillipps, Julian—Vice President, Southern Shellfish Company, Inc. | Ex. 34. |
| Price, Clemmie — Woman oyster packer employee of E. H. Bendiksen Co. Affidavit to rebut testimony of Food and Drug employee (R. 866). | Ex. 42. |
| Sherwood, Randolph M.—The Sherwood Company, Oysterville, Washington. | Ex. 23. |
| Steele, E. H.—see above. Affidavit supporting photographs of overfill of Western oysters in attempting to comply with 6½ ounce fill. | Ex. 37. |
| Walker, Gordon—Photographer of pictures of oyster canning operation at E. H. Bendiksen Company. | Ex. 38. |
| Wayman, W. R.—Employee, American Can Company. Supported Dr. Clough's Ex. 27. | Ex. 27. |
| Willetts, N. J.—Research representative in charge American Can Company, Seattle laboratory. Participated with Dr. Clough in analysis in Ex. 27. See also Ex. 19 at first hearing. | Ex. 27. |
| Wilson, C. L.—The Wilson Packing Co., Nahcotta, Washington. | Ex. 24. |

In The
United States Circuit Court of Appeals
For the Ninth Circuit

WILLAPOINT OYSTERS, INC., *Petitioner,*

vs.

OSCAR R. EWING, Administrator, and
J. DONALD KINGSLEY, Acting Admin-
istrator, FEDERAL SECURITY AGENCY,
FOOD AND DRUG ADMINISTRATION,

Respondents.

No. 11936

PETITIONER'S OPENING BRIEF

STATEMENT OF JURISDICTION AND PLEADINGS

This is a petition for judicial review of two Final Orders of the Federal Security Agency prescribing standards of identity and standards of fill for canned oysters. The *First Final Order* was issued March 10, 1948, by respondent, Hon. Oscar R. Ewing, Federal Security Administrator. The *Second Final Order* was issued August 3, 1948, by respondent, Hon. J. Donald Kingsley, Acting Federal Security Administrator.

I. Opinions Below

The First and Second Final Orders were dated March 10, 1948, and August 3, 1948, respectively, and are attached to petitioner's first supplemental petition for judicial review filed herein September 13, 1948, as Appendices A and B thereof. They are reported

respectively in the Federal Register of March 13, 1948, and of August 12, 1948, 13 F.R. 1337-9; 4653-4. For convenience, they are again reproduced herein as *Appendices A and B* hereof.¹

II. Statutory Provisions to Sustain Jurisdiction

The jurisdiction of this court is invoked under Section 701(f) (1), (3), (6) of the Federal Food, Drug, and Cosmetic Act [52 Stat. 1055; 21 U.S.C.A. (Supp.) 371(f) (1), (3), (6)]. It provides in part:

“(1) In a case of actual controversy as to the validity of any order * * * any person * * * adversely affected * * * may * * * file a petition with the Circuit Court of Appeals * * * for a judicial review of such order. * * * ”

This case presents an actual controversy. Petitioner would be adversely affected if either of the two Final Orders become effective. Petitioner so alleged in its original petition for judicial review filed May 22, 1948, for judicial review of respondents' First Final Order, and in petitioner's supplemental petitions filed September 13, 1948, for judicial review of respondents' Second Final Order.

Section 701 (f) further provides in part:

“(3) The court shall have jurisdiction to affirm the order, or to set it aside in whole or in

¹It will be noted that the First Final Order of March 13, 1948 (App. A hereof, page 7), refers to a prior final order dealing with canned oysters effective in 1945. Reference to said order discloses in turn certain earlier decisions of predecessors of the Food and Drug Administration and the Department of Agriculture relating to canned oysters. The full text of these pertinent prior regulations are assembled for convenience as Appendices C and D hereof.

part, temporarily or permanently. If * * * such order is not in accordance with law the court shall * * * order the Administrator to take action * * * in accordance with law. * * * ”

The original petition for judicial review and supplemental petitions filed herein allege the many respects in which both orders are “not in accordance with law” and pray that both orders be permanently set aside.

Section 701(f) further provides in part:

“(6) The remedies provided * * * shall be in addition to * * * any other remedies provided by law.”

The remedies provided by §10 of the Administrative Procedure Act [60 Stat. 243, 5 U.S.C.A. (Supp.) 1009(e)] are also invoked. It provides in part:

“(e) So far as necessary to decision * * * the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * hold unlawful and set aside * * * findings, and conclusions found to be (1) *arbitrary, capricious, an abuse of discretion* * * * (2) *contrary to constitutional right* * * * (3) *in excess of statutory jurisdiction* * * * (4) *without observance of procedure required by law*; (5) *unsupported by substantial evidence* * * *. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, * * * .”²

The original and supplemental petitions for judi-

²Italics for emphasis are supplied throughout this brief unless otherwise noted.

cial review filed herein allege, in detail, that both said Final Orders violate the Administrative Procedure Act in each of the five above enumerated respects.

III. Transcript of Proceedings Before the Administrator

Section 701(f) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C.A. (Supp.) 371(f)(1)] further provides in part:

“(1) * * * The Administrator, promptly upon service of the summons and petition, shall certify and file in the court the transcript of the proceedings and the record on which the Administrator based his order.”

Pursuant thereto, the Federal Security Administrator and the Acting Federal Security Administrator, respectively, have filed with this court, the transcript of the proceedings and the record upon which each such respondent certified that he based his respective execution of the *First Final Order* of March 10, 1948, and of the *Second Final Order* of August 3, 1948.

On June 7, 1948, this court entered an order granting petitioner's motion to present this cause on a typewritten transcript of the record.

In conformity therewith, petitioner, on September 13, 1948, filed in this court three true copies of the transcripts of proceedings and records in form identical to those certified to by the Administrator and by the Acting Administrator, respectively. An additional or fourth copy thereof was served on counsel for respondents.

References herein will be made to that record.³

³The transcript of proceedings before the Federal Security Administrator consists of *Vol. I*, *Vol. II*, and *Vol. III* of the *Original Transcript of Record* which was certified to by respondent Ewing and filed with this court June 3, 1948, and of *Vol. I*, *Vol. II*, *Vol. III*, and *Vol. IV* of the *Supplemental Transcript of Record* which was certified to by respondent Kingsley and filed with this court on August 10, 1948.

References to these volumes will be herein designated as *Orig. Vol. I*, etc., and *Supp. Vol. I*, etc., respectively.

The record of hearings before the Administrator and Acting Administrator, and exhibits received therein are serially paged and serially numbered, respectively, pages 1 to 701, and Exhibits 1 to 21, inclusive, contained in *Orig. Vol. II* and *Orig. Vol. III* of the *Original* 3 volumes; and pages 702 to 1178, and Exhibits 22 to 42, inclusive, contained in *Supp. Vol. I* and *Supp. Vol. II* of the *Supplemental* 4 volumes.

References to pages of the record of hearings and to exhibits received will be herein designated, respectively, as *R. 1*, etc., to *R. 1178*, and *Ex. 1*, etc., to *Ex. 42*.

It will be noted that the original certified transcripts furnished by respondents, and the true copies thereof furnished by petitioner, do not contain serially numbered pages as to pleadings. See particularly *Orig. Vol. I*. Accordingly, as a convenience to the court and to the parties, counsel for petitioner has prepared a detailed tabulation (on yellow paper) of the contents of each of the 7 volumes which he has inserted in the frontispiece of each set of *Orig. Vol. I*. A separate copy of the contents of each succeeding volume is inserted in the frontispiece of each of said volumes. It tabulates the contents of each volume by *items*.

Reference to any such document will be indicated as *Orig. Vol. I, item 1*, etc., when no other ready reference is indicated.

IV. Summary of Pleadings

On March 10, 1948, respondent, Hon. Oscar R. Ewing, after notice and hearing at Washington, D. C., signed the *First Final Order* to become effective 90 days thereafter, or on June 11, 1948 (App. A, p. 13, hereof).

On April 29, 1948, petitioner, seeking first to exhaust its administrative remedies, filed a petition with the Administrator for further hearing, reopening, reconsideration, revision, and oral argument concerning the reasonableness and lawfulness of said final order (*Orig. Vol. I, item 2*).

On May 22, 1948, petitioner, having waited as long as possible prior to effective date of order for the Administrator to rule on its petition for further hearing * * * and oral argument of April 29, 1948, and not being advised of any decision thereon, filed with this court a petition for judicial review seeking a temporary and permanent injunction and an order remanding the proceedings to the Administrator to take further evidence with respect to petitioner's method of blanching oysters, which had been newly developed commercially subsequent to the close of the record upon which the Administrator based his First Final Order of March 10, 1948.

On May 25, 1948, respondent Ewing denied the petition for further hearing * * * and oral argument of April 29, 1948 (*Orig. Vol. I, item 1*).

On June 8, 1948, this court issued an order remanding the proceedings to the Administrator, respondent Ewing, to take further evidence, and temporarily stayed the effect of said order.

On July 7 to 12, 1948, a further hearing was held before a Presiding Officer, designated by respondent Ewing (R. 703).

On August 3, 1948, respondent Kingsley, as Acting Administrator, signed the *Second Final Order*, again denying relief sought by petitioner (*Supp. Vol. IV*; also App. B hereof).

On August 19, 1948, petitioner seasonably filed in this court its motion for an order continuing the present stay pending final determination as provided in this court's order of June 8, 1948, and for a permanent injunction, and for an order fixing dates for further proceedings herein.

On September 13, 1948, petitioner filed and served its first and second supplemental petitions herein, naming Acting Administrator Kingsley as an additional respondent, and challenging the validity of both the First Final Order of March 10, 1948, of respondent Ewing, and the Second Final Order of August 3, 1948, of respondent Kingsley.

Petitioner also filed on the same date the requisite copies of the transcript of proceedings before the Administrator.

Various other motions, affidavits and memoranda of authorities have been filed by the parties, but detailed recital thereof is not presently deemed essential.

On September 14, 1948, the matter came before this court on petitioner's motion filed August 19, 1948.

On September 30, 1948, this court entered its order

providing that:

“enforcement of the final orders of the Administrator * * * are hereby stayed until the final order of this court upon the merits and the law on review to this court.”

STATEMENT OF THE CASE

Both final orders were promulgated under §401 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C.A. 341, *infra*). The orders establish *new* definitions and standards of identity and *new* standards of fill for canned oysters. They would increase the drained weight of oyster meats packed by petitioner and other Western producers from a long established standard, and change the accepted name of the food long used by petitioner and other West Coast packers (App. A and B).

From 1906 (when the Federal Food and Drug Act was enacted, *infra*) until 1942 (when the War Production Board imposed certain temporary tin restrictions, *infra*) a series of decisions had required that 5 ounces of drained weight of oyster meat be contained in a standard No. 1 can⁴ (Callaway, R. 63).

In 1928, the industry started on the West Coast. A witness for the Food and Drug Administration testified that at that time:

“ * * * the question arose as to what fill should

⁴This No. 1 size of can (also termed Picnic, E.O.—for Eastern Oyster, or Campbell’s Soup size), is treated as the standard size in these proceedings and will be so referred to herein. The 5 ounce fill is equivalent to a fill of 46 per cent of can capacity. Other sizes of cans are proportionately filled (App. C, Finding 3, p. 27). To translate per cent to ounces, see note, App. A, p. 13. *infra*.

be used, and *after some investigation it was reported that the five-ounce fill was satisfactory for the Pacific oysters, and they began to be canned with that fill.*

“At that time both the *Southern and Pacific* oysters were using the same fill.

“That * * * continued up until about the beginning of the war when there was a cessation of canning on the Pacific Coast * * * .” (Callaway, R. 63-4)

In 1946 the Western industry resumed canning operations. It again packed the lawful 5 ounce fill applicable to its large sized oysters (Callaway, R. 64).

Petitioner's canned oysters have been continuously marketed since 1931 under the label:

“OYSTERS”

Beneath this descriptive term is the legend:

“PRIDE OF THE PACIFIC”

with the name of petitioner and its address at Seattle, Washington, printed below in clear letters (respondents' Ex. 31).

In practical effect, the two assailed Final Orders would require petitioner (and all other Western packers) to:

(1) *increase* the drained or cut-out weight of oyster meats from the existing 5 ounce standard for the large Western oysters to a new requirement of 6½ ounces; or a 30 per cent increase per can (App. A, p. 12-13); and

(2) *remove* from petitioner's labels (and other Western packers) a long-continued use on the can labels of the generic description “OYSTERS”

providing that:

“enforcement of the final orders of the Administrator * * * are hereby stayed until the final order of this court upon the merits and the law on review to this court.”

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(1) *increase* the drained or cut-out weight of oyster meats from the existing 5 ounce standard for the large Western oysters to a new requirement of 6½ ounces; or a 30 per cent increase per can (App. A, p. 12-13); and

(2) *remove* from petitioner's labels (and other Western packers) a long-continued use on the can labels of the generic description “OYSTERS”

and require thereafter that such labels be changed to "PACIFIC OYSTERS" (App. A, p. 6).

At the same time the two assailed Final Orders would immediately permit Southern packers of an entirely different species of oysters, subject to different conditions of growth and of processing, to:

(1) *lower* the required drained weight of small Southern oysters from the existing 7½ ounce standard, heretofore found reasonable by the Food and Drug Administration for the Southern type of pack, to a new requirement of 6½ ounces; or a 13 per cent reduction per can (App. A, p. 12-13, App. C. p. 31); and

(2) *confer* on Southern packers a new and exclusive right to label their products by the generic description:

"OYSTERS"

without any restrictive geographical designation of source or species (App. A, p. 6).

The two Final Orders requiring compliance with both of these concurrent and contrasting *detriments to petitioner and benefits to Southern packers* are unlawful in violation of the Federal Food, Drug, and Cosmetic Act and of the Administrative Procedure Act, *infra*.

I. Questions Involved

Whether, as alleged, the two Final Orders are "*not in accordance with law*"⁵ because they are:

(a) made "without observance of procedure required by law";

⁵21 U.S.C.A. (Supp.) 371(f) (3) *infra*, p. 12.

(b) “based on findings of fact which are not supported by substantial evidence.”

(c) “in excess of statutory jurisdiction”;

(d) “arbitrary, capricious, and an abuse of discretion”; and

(e) “contrary to constitutional rights”;⁶

II. Manner in Which Questions Are Raised

The questions are raised by the pleadings filed by petitioner, and by the transcript of proceedings and records filed by respondents upon the basis of which each such respondent has certified that he based his First Final Order and his Second Final Order, respectively.

Respondents have filed certain interlocutory motions and briefs in opposition to motions filed by petitioner for temporary stay orders; but respondents have not filed any answer or other form of pleading challenging either the jurisdiction of this court or answering the merits of the allegations of petitioner’s original and supplemental petitions for judicial review.

III. Statutes Involved

The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040 [21 U.S.C.A. (Supp.) 301, *et seq.*], in parts pertinent to this case, provides:

“Sec. 401 (21 U.S.C.A. 341). *Whenever in the judgment of the Administrator such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a rea-*

⁶5 U.S.C.A. (Supp.) 1009(e) *infra*, p. 17.

sonable definition and standard of identity, a *reasonable* standard of quality, *and/or reasonable* standards of fill of container * * * .”

“Sec. 701(e) [21 U.S.C.A. 371(e)]. The Administrator, on his own initiative or upon an application of any interested industry or substantial portion thereof stating reasonable grounds therefor, *shall hold a public hearing* upon a *proposal* to issue, amend, or repeal any regulation contemplated by any of the following sections of this Act: 401 * * * . At the hearing any interested person may be heard in person or by his representatives. As soon as practicable after completion of the hearing, the Administrator shall by order make public his action in issuing, amending or repealing the regulation or determining not to take such action. The Administrator shall base his order *only on substantial evidence of record at the hearing* and shall set forth as part of the order detailed findings of fact on which the order is based. * * * ”

“Sec. 701(f)(1) [21 U.S.C.A. 371(f)(1)]. In a case of actual controversy as to the validity of any order under subsection (e), any person who will be adversely affected by such order if placed in effect may * * * file a petition with the Circuit Court of Appeals of the United States * * * .”

* * * * *

“(3) [21 U.S.C.A. 371(f)(3)]. The court shall have jurisdiction to affirm the order, or to set it aside in whole or in part, temporarily or permanently. If * * * such order is *not in accordance with law* the court shall by its judgment order the Administrator to take action * * * in accordance with law. *The findings of the Administra-*

tor as to the facts, if supported by substantial evidence, shall be conclusive.

* * * * *

“6 [21 U.S.C.A. 371(f)(6)]. The remedies provided * * * shall be in addition to * * * any other remedies provided by law.”

The Administrative Procedure Act of June 11, 1946, c. 324, 60 Stat. 237 [5 U.S.C.A. (Supp.) 1001, *et seq.*], in parts pertinent to this case provides:

“DEFINITIONS

“Sec. 2. (21 U.S.C.A. 1001) as used in this Act—

“(a) AGENCY.—‘Agency’ means each authority * * * of the Government of the United States.

* * * * *

“(c) RULE AND RULE MAKING.—‘Rule’ means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy * * * and includes the approval or prescription for the future of rates * * * or practices * * *. ‘Rule making’ means agency process for the formulation, amendment, or repeal of a rule.

“(d) ORDER AND ADJUDICATION. — ‘Order’ means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. ‘Adjudication’ means agency process for the formulation of an order.

“(e) LICENSE AND LICENSING. — ‘License’ includes the whole or part of any agency *permit*, certificate, *approval*, registration, charter, mem-

bership, statutory exemption or other form of permission. 'Licensing' includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

* * * * *

"(g) AGENCY PROCEEDING AND ACTION.—'Agency proceeding' means any agency process as defined in subsections (c), (d), and (e) of this section. 'Agency action' includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."

"RULE MAKING

"Sec. 4. (21 U.S.C.A. 1003)

* * * * *

"(b) PROCEDURES.— * * *. *Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of section 7 and 8 shall apply in place of the provisions of this subsection.*"

"ADJUDICATION

"Sec. 5. (21 U.S.C.A. 1004). *In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, * * *.*

"(c) SEPARATION OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. * * *, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to

participate; * * * . No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving * * * rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency."

"HEARINGS

"Sec. 7. (21 U.S.C.A. 1006). In hearings which section 4 or 5 requires to be conducted pursuant to this section—

* * * * *

"(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, * * * evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record * * * and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

* * * * *

"(d) RECORD.—The transcript of testimony

and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 * * * . *Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.*"

"DECISIONS

"Sec. 8. (21 U.S.C.A. 1007). In cases in which a hearing is required to be conducted in conformity with section 7—

"(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, *the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require * * * the entire record to be certified to it for initial decision.*

"(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review * * * *the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, * * * and (3) supporting reasons for such * * * proposed findings or conclusions. The record shall show the ruling upon each such finding (or), conclusion * * * presented. All decisions * * * shall * * * include a statement of (1) findings and conclusions, as well as the reasons or basis therefore, upon all the material issues of fact, law, or discretion presented on the record; * * * .*"

“JUDICIAL REVIEW

“Sec. 10. (21 U.S.C.A. 1009)

* * * * *

“(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

* * * * *

“(e) SCOPE OF REVIEW.—*So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; * * * . In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.*”

HISTORICAL NARRATIVE OF FACTS

Oysters have been canned commercially for the past fifty years. The industry was located on the Gulf and South Atlantic Coasts until 1928 when it also developed on the West Coast (Callaway, R. 31). During all of these years until 1944 the standard of fill for canned oysters remained unchanged (App. D).

In 1906 Congress enacted the Food and Drug Act of June 30, 1906, c. 3915, 34 Stat. 768 (21 U.S.C.A. 1, *et seq.*). Administration of this Act was vested in the Department of Agriculture, *29 Op. Atty. Gen. 494 (1912)*. This Act, as from time to time amended,⁷ continued in effect until 1938, when, contemporaneous with the enactment of the Federal Food, Drug, and Cosmetic Act, *supra*, the former act was superseded. The new act now vests jurisdiction in the Federal Security Administrator [21 U.S.C.A. (Supp.) §321 (d)].

I. History of Federal Requirements for "Fill of Container" of Canned Oysters

During the years from 1906 to 1944, respondents and their predecessor, the Department of Agriculture,

⁷The McNary-Mapes Amendment of July 8, 1930, c. 874, 46 Stat. 1019, expressly amended §10 of the Food and Drug act to authorize establishment of reasonable standards of quality, condition and fill for canned foods. See *Nolan v. Morgan*, 69 F.(2d) 471 (C.C.A. 7, 1934) *aff'g.*, 3 F. Supp. 143. Theretofore standards of fill of container had been established pursuant to then existing Food and Drug Act prohibitions against adulteration and misbranding of products which were subject to criminal and forfeiture proceedings. 21 U.S.C.A. 1, *et seq.*

issued several regulations having to do with the required fill of canned oysters and related products. The full text of each of these decisions is set forth in Appendix D, and are summarized below.

In 1912 it issued Food Inspection Decision No. 144. It stated that the can:

“* * * should be *as full of food as is practicable* for packing and processing *without injuring the quality or appearance* of the contents.”

It then pointed out that in some foods, as for example, canned tomatoes, the addition of water is deemed adulteration, but that:

“*Other foods may require the addition of water, (or) brine, * * * either to combine with the food for its proper preparation or for the purpose of sterilization * * * .*”

It then gave as an example, peas, which, it found, should contain only sufficient liquor to fill the interstices and cover that product. It then ruled that:

“*Canned foods * * * will be deemed * * * adulterated if they are found to contain water, (or) brine * * * in excess of the amount necessary for their proper preparation and sterilization.*” (App. D, p. 35)

On February 19, 1914, the Department promulgated two regulatory opinions, Nos. 2 and 3, which fixed, respectively, the amount of drained weight of clam meat, and of oyster meat, required in various sizes of canned clams and canned oysters.

Opinion No. 2 referred to Food Inspection Decision No. 144, *supra*, recited inquiries received from packers of canned clams as to the weight which cans should

contain in order to comply with the requirements of the above decision, recited an investigation by its Bureau of Chemistry, and found:

“As a result of this investigation * * * that cans which contain (*a weight of 5 ounces in the No. 1 regular or oyster can and proportional weights in other cans*) of drained clam meat * * * *will satisfactorily fulfill the requirements of Food Inspection Decision No. 144.*” (App. D, p. 37)

On the same date, February 19, 1914, the Department issued Opinion No. 3, which recited that:

“ * * * pending further investigation the *weights (of oyster meats)* agreed upon by the canners (*of 5 ounces in the No. 1 can, and proportional weights in other cans*) * * * *will be regarded * * * as satisfactorily fulfilling the requirements of Food Inspection Decision No. 144.*” (App. D, p. 38)

Thus in 1914 drained weights were established for all canned oysters, identical with those found reasonable for canned clams, on the basis of the 5 ounce fill.⁸

On October 21, 1914, the Department issued Opinion No. 88, which confirmed its earlier determination of a 5 ounce drained weight prescribed in Opinions Nos. 2 and 3, and further provided that:

“ * * * *the quantity * * * of a package of canned (cove) oysters or canned clams, as usually packed and processed, should be declared on the basis of the ‘cut-out’ weight of the drained meat.*” (App. D, p. 38)

⁸The can sizes vary but as to the No. 1 regular can and as to the No. 2 regular can, drained weights of 5 ounces and 10 ounces, respectively, were prescribed, and the others were proportionate (App. D, p. 37).

This required the can to be labelled in effect "Drained Weight—5 ounces." It was repealed in 1923. See Opinion No. 379, below.

On August 18, 1915, it promulgated Opinion No. 134 which outlined the procedure for draining in order to determine the cut-out or drained weight of canned clams and canned oysters (App. D, p. 39).

On February 14, 1923, it revoked Opinion No. 88 by its Opinion No. 379, stating:

"Because the liquid packing medium in canned clams and canned oysters has a certain food value and is ordinarily utilized as food, no objection will be made to marking the net weight of these products in terms of total weight, liquid included." (App. D, p. 40)

It then reaffirmed the findings in Opinions Nos. 2 and 3, *supra*, that the drained or cut-out weights of clam meats and of oyster meats should be 5 ounces in the No. 1 can (App. D, p. 40). This restored permission to show "Net Weight," 5 ounces of which were required to be oyster meat and the balance a packing medium *"of certain food value and * * * ordinarily utilized as food."*

The 5 ounce drained weight was adopted by all canners of canned oysters (Rowe, R. 94). These orders continued in effect unchanged in any respect by the Department of Agriculture, the Food and Drug Administration, or the Federal Security Agency, during the years from the various dates that they were promulgated until 1944, as to Southern oysters, and 1947-8, as to Western oysters (App. C, A and B).

However, in the latter part of 1942, the War Production Board issued Conservation Order M-81 to conserve the wartime use of tin plate.^{8a} It provided, among other things, that canned oysters be packed only in certain sizes of cans, the smallest of which was the standard No. 1 can, and that if packed, the No. 1 can must contain not less than 7½ ounces of drained weight (Carriere, R. 448).

The Southern industry had already complied with a similar War Production Board requirement in increasing the drained weight contents of its pack of Southern canned shrimp to 7½ ounces, and it likewise agreed to adopt the required wartime 7½ ounce fill for canned oysters (Holcombe, R. 550). It was their definite understanding that the heavy fill would not continue indefinitely but that they "would revert back to the pre-war fill (5 ounces) after the conflict was over" (Holcombe, R. 550; Carriere, R. 448-9; Callaway, R. 65).

The Western industry did not adopt the War Production Board measure and hence did not obtain tin for canning oysters during the war years while the war conservation order was in effect (Bendiksen, R. 443). During that period they sold their products chiefly in the fresh market (Clough, R. 204). The Western industry resumed packing of canned oysters in April, 1946, at the lawful pre-war weight of 5 ounces for the No. 1 can (Bendiksen, R. 443-4; Callaway, R. 64).

^{8a}7 F.R. 947, 4836, and successive amendments. See 32 C.F.R. (Cum. Supp.) p. 9318.

But, after War Production Board Conservation Order M-81 had become effective in 1942, the Food and Drug Administration announced that it would hold a hearing on the fill of containers for canned oysters in Washington, D. C., on August 22, 1944 (Carriere, R. 450).

The Pacific Coast canners entered an appearance. No oysters were being canned on the Pacific Coast, and there was no evidence with respect to Pacific oysters (Callaway, R. 66-7).

The Southern industry did not appear at that hearing "because it occurred during the period of peak production" in the shrimp pack, and because there remained "the problem of tin conservation" (Carriere, R. 450-1; Sewell, R. 545).

Mr. Callaway, a witness for the Food and Drug Administration, stated in the 1947 hearing:

"A hearing was held (in 1944), at which *I testified. The present standard fill of container was adopted on the basis of that evidence.*" (Callaway, R. 15)

Exhibit 3 is the "present standard fill" to which Mr. Callaway referred. It established in 1944 a 7½ ounce fill for the small Southern oysters. That order is reproduced herein as Appendix C.⁹

⁹The order of March 10, 1948 (App. A, p. 7, finding 2) identifies this order as "an order effective February 23, 1945." These dates are reconciled because Exhibit 3, or Appendix C, was published in the Federal Register November 25, 1944, 9 F.R. 14008-9, and by its closing paragraph provided that it should become effective on the 90th day following the date of publication, *i.e.*, February 23, 1945.

It first recites (with some modifications of language and intent) the effect of some of the prior orders of the Secretary of Agriculture (App. C, findings 1 and 2; compare texts quoted in Appendix D).

This 1944 order (App. C) stated in finding 4 that when cans of oysters were filled to the 5 ounce fill, in compliance with the then outstanding orders of the Secretary of Agriculture:

“ * * * the cans contain a smaller quantity of oysters than consumers expect from the size of the container.”¹⁰ (App. C, finding 4)

The 1944 order contained, in part, the following findings which summarize much of the background of this proceeding:

“5. Prior to 1928 all oyster canneries in this country were located along the Atlantic Coast and the Gulf Coast. In 1928 oyster canning was begun on the Pacific Coast. *At present oyster canneries are situated principally on the South Atlantic and Gulf Coasts and the Northwest Pacific Coast.*

“6. *The oysters canned on the Atlantic Coast and Gulf Coast are for practical purposes the same type but those canned on the Pacific Coast are of different species, and are considerably larger in size.*

“7. *After the shell oysters are delivered to the cannery * * * (they) are * * * steamed * * * .*

¹⁰The only cans in evidence were of Southern oysters. Moreover, as recently as July 10, 1947, Mr. Callaway testified that “during all of these years” he did not “recall any definite” complaints by consumers as to the 5 ounce fill of container of canned oysters (Callaway, R. 64).

After steaming they are * * * filled into the cans * * *. * * * with a predetermined weight of oysters, brine or water and a salt tablet are added, and the cans are sealed by machine and then processed by heat to prevent spoilage of the product.

"8. The steaming causes the shells to open * * * at the same time the oyster meat loses liquid and shrinks in both size and weight. Until the maximum shrinkage is reached, increased time or temperature of steaming increases the shrinkage. The time and temperature * * * varies * * * depending on a number of factors such as the amount of shrinkage the canner desires and the difference of composition of the oysters.

"9. In general, Pacific Coast canneries do not steam to the same extent as Atlantic and Gulf canneries. In Atlantic and Gulf packed oysters there is usually a slight gain in weight during processing in the can, whereas in Pacific packed oysters a considerable part of the total shrinkage takes place in the processing with a consequent loss of weight.

"10. Considerable experimental work has been done in recent years by the Food and Drug Administration on Atlantic Coast and Gulf Coast canned oysters for the purpose of establishing a fill of container standard. Very little experimental work has been done by the Administration on Pacific Coast canned oysters, the principal reason being that none have been packed there since 1942.

"11. It is entirely practicable under existing cannery practices for canneries on the Atlantic Coast and Gulf Coast to pack oysters so that the drained weight of oysters taken from each can

*will be at least 68% of the water capacity of the container. Such a fill can be met in commercial practice without unreasonable difficulty and without damage to the product. * * **

*"12. Pacific Coast canners have not packed oysters commercially since 1942. * * * It has been the practice of Pacific Coast oyster canners to pack the No. 1 can to give a drained weight of 5 ounces * * *. There are usually from 4 to 8 oysters in the No. 1 can * * * to give the 5-ounce drained weight. * * * The average drained weight per oyster of Pacific Coast canned oysters is at least 1/2 ounce and is usually more.*

"13. Atlantic Coast and Gulf Coast canned oysters vary in size, their drained weight averaging from about 4 oysters per ounce to about 13 oysters per ounce.

** * * * **

"CONCLUSIONS

"1. There is insufficient evidence in this record to warrant the findings of fact on which to base a standard of fill of container when drained weight of oysters in a particular can averages 1/2 ounce or more per oyster.

*" * * * the following regulation is hereby promulgated:*

*"§36.6 * * * (a) The standard of fill of container for canned oysters when the drained weight * * * after processing averages less than 1/2 * * * ounce per oyster is * * * not less than 68 per cent of the water capacity * * * .*

*"(b) * * * canned oysters means oysters packed into containers which are then sealed and processed by heat to prevent spoilage.*

*" * * * * **

The Southern oyster industry did not challenge the validity of this 1944 order, and the Western packers could not challenge it, although they alone had protested, because they were not "adversely affected" within the jurisdictional requirements of Section 701(f)(1) of the Food, Drug, and Cosmetic Act, *supra*.

In 1946, petitioner and other Pacific Coast canners resumed canning on the 5 ounce drained weight (Callaway, R. 64). This was the lawful standard applicable to the large Pacific oysters pursuant to the above 1944 order (App. C).

A witness for the Food and Drug Administration testified a year or more later on July 10, 1947, that "violent complaints" were received by the Food and Drug Administration from the Southern industry who were packing to the 7½ ounce fill (Callaway, R. 64; Ex. 4). The Southern industry had voluntarily packed at that fill under the War Production Board Order M-81 (Holcombe, R. 550), and that same 7½ ounce fill had been carried forward as to the small Southern oysters by the Food and Drug Administration order of November 18, 1944 (App. C).

But, the first advice that petitioner and others in the Western industry received was by a notice published in the Federal Register in February 1947 (Ex. 8). It stated in part:

"* * * *Regulations* * * * *promulgated on November 25, 1944* * * * *require (s)* * * * *when the drained weight* * * * *averages less than 1½ ounce per oyster,* * * * *(that) not less than 68 per cent of the* * * * *capacity of the can* * * *

(be) packed. For the No. 1 can * * * *a drained weight of about 7.5 ounces* of oysters is required.

“At the hearing (in August 1944) * * * there was insufficient evidence * * * to base a standard of fill * * * when the drained weight * * * averages $\frac{1}{2}$ ounce or more per oyster. * * *

“* * * some packers of canned oysters are now putting up *large oysters*, not subject to the * * * standard, so that the drained weight * * * is 5 ounces * * *. Although such canned oysters *are not subject to the* * * * fill of container *standard* they are subject to the * * * Food, Drug, and Cosmetic Act. *Section 402(b)(2)* * * * states that a food shall be deemed to be adulterated if any substance has been substituted * * *. *Section 403(d)* * * * provides that a food shall be deemed to be misbranded if its container is * * * misleading. It is our opinion that these sections *apply* to canned oysters *if water, brine, or liquid draining from oysters during processing, replaces a quantity of oysters which should be added to fill the can.*

“*It is the intention of this Agency to call a hearing * * * to adopt definitions and standards of identity and * * * fill of container for all canned oysters. In the meantime the Food and Drug Administration will apply the substantive provisions of the Act to canned oysters where the container is not as full of oysters as is practicable without injury to the quality or appearance of the product.*”

This notice by its terms would appear to indicate that petitioner and others on the Pacific Coast were in some manner violating the Act, although they had resumed after the war with the knowledge of the

Food and Drug Administration (Callaway, R. 64), and were adhering to the lawful 5 ounce drained weight that had been standardized since 1914 (App. D, pp. 35-40).

However, although this notice suggested that the existing standards of fill might be *increased*, the Commissioner of the Food and Drug Administration on May 22, 1947, notified his Chiefs of the Food and Drug District Offices throughout the country, that application had been received to *reduce* the required drained weights (Ex. 6). It states in part:

"As you know, *applications have been received* from a substantial portion of the canned oyster and canned shrimp industries *asking* that *hearings* be called *on proposals* * * * *to lower the required drained weights*. In the case of canned oysters the Administrator has also issued a notice (Federal Register of February 7, 1947), stating * * * his intention to call a hearing on a proposal to amend that part of the fill of container standard limiting its application to canned oysters * * * of * * * less than $\frac{1}{2}$ ounce. * * * hearings will be called in Washington early in July on proposals to amend both standards. *Probably a session of the canned oyster hearing will be held later on the Pacific coast.*

* * * * *

"* * * *The applications for changes in the fill of container standard for both canned oysters and canned shrimp state that the quality of both foods is injured by the fills now required.* * * *"

On June 6, 1947, a notice of hearing to commence July 10, 1947, at Washington, D. C., was published in the Federal Register (Ex. 1). It did not advise of

any precise "*proposal*" to change the standard of fill, either by increasing or lowering the then existing standards of 5 ounces for large oysters and of 7½ ounces for small oysters, but left that figure blank "to be fixed on the basis of evidence taken at the hearing" [Ex. 1, p. ii, §36.6(a)].

The foregoing summarizes the facts which transpired with respect to the standard of fill of container prior to the 1947-1948 hearings.

II. History of "Common or Usual Name" of Canned Oysters

The *first* reference to the "common or usual name" of canned oysters is contained in Opinion No. 88, issued October 21, 1914 (App. D, p. 88). It identifies all canned oysters uniformly by the single term:

"CANNED (COVE) OYSTERS".

At that time, all canned oysters were produced on the Atlantic and Gulf Coast (App. C, p. 27).

The *second* reference to "common or usual name" is contained in the November 18, 1944, decision of the Federal Security Administrator (App. C). It is captioned in part:

"Definitions and Standards of Identity."

Finding No. 6 states in full text:

"6. The oysters *canned* on the *Atlantic Coast and Gulf Coast* are for practical purposes *the same type* but those canned on the Pacific Coast are of different species, and are considerably larger in size."

In Findings 12 and 13, the 1944 order (App. C, p. 29)

distinguishes between oysters on the basis of size, finding that Pacific Coast oysters are usually $\frac{1}{2}$ ounce or more in drained weight, and that Atlantic and Gulf Coast oysters' average from $\frac{1}{4}$ ounce to about $\frac{1}{13}$ th ounce in drained weight.

The *third* reference to "common or usual name" is contained in the 1944 order. Its *Conclusion* portion promulgates the following regulation:

"§36.6(b) For the purposes of this section *canned oysters means oysters* packaged into containers which are then sealed and processed by heat to prevent spoilage." (App. C, p. 31)

Petitioner's canned oysters have been continuously so labelled as "OYSTERS" without geographical restriction for 16 years (Ex. 31, R. 755).

No further reference to "common or usual name" was made until the 1947-1948 hearings (Ex. 1).

III. Summary of Evidence and Record¹¹ Considered by the Administrator in Issuing His First Final Order of March 10, 1948; and That Considered by the Acting Administrator in Issuing His Second Final Order of August 3, 1948.

The *oral* evidence¹¹ in this case, at the two successive hearings, comprises 1178 pages of testimony of 19 witnesses. Of these, 7 are officials of the Food and Drug Administration, Messrs. Allen, Callaway, Hansen, Lovejoy, Nicholson, Rowe, and Steagall; 7 testified on behalf of the Western oyster industry, Messrs.

¹¹For record references to testimony of each witness and of exhibits see Table of Witnesses and Exhibits before Administrator, *supra*.

Bailey, Barnett, Bendiksen, Clough, Esveldt, Kincaid, and Wiegardt; and 5 are officers of the Southern oyster industry, Messrs. Carriere, Holcombe, Jastremski, Sewell and Strasburger.

The *documentary* evidence offered by the parties consists of 42 exhibits comprising more than 200 pages, of which 21 were offered by the Administrator, 20 by the Western industry, and 1 by the Southern industry; and of various pleadings of the parties.

For summary purposes, the evidence and record may be briefly reviewed in chronological divisions, set forth in the sequence of proof:

(A) Evidence offered at July, 1947, hearings

(1) *By the Administrator:*

Oral evidence was offered through 3 witnesses, Messrs. Callaway, Rowe, and Allen. It contains the historical background; the nature of oyster canning operations in the Southern states of Louisiana and Mississippi and in the Western states of Washington, Oregon, and California; complaints from the Southern oyster industry that Western oysters, although of a different species and packed under different methods, should contain an identical drained weight regardless of such difference of characteristics; testimony concerning certain experimental packs put up by Food and Drug employees, alleged to show that the Western oyster could be packed to yield a drained weight of 7½ ounces (Callaway, R. 13-91; Rowe, R. 92-128; Allen, R. 128-139); testimony by its principal witness that the drained weight should be reduced from the 7½ ounce fill previously recommended (R.

15) and found reasonable for Southern oysters (Ex. 3), to a new drained weight of 7 ounces to apply to both industries (Callaway, R. 38); and opinion testimony based on reports made to Food and Drug inspectors as to the viewpoint of buyers (Exs. 5, 7).

The *documentary* evidence consisted of 13 exhibits, 4 of which were formal copies of official notices, Ex. 1, 2, 3, and 8; 2 were interoffice communications within the Food and Drug Administration, Exs. 4 and 6; and 7 others as follows:

Ex. 5 consists of 14 numbered pages, followed by a price chart, and of 30 unnumbered pages. It contains reports of Food and Drug inspectors of interviews made responsive to instructions contained in the interoffice communication, *Ex. 4*. Neither the name nor address of any individual reported to have been interviewed is shown in any way. He is represented in each instance only by a coded alphabetical letter without identification (See *Ex. 5*).

Ex. 7 contains similar reports of Food and Drug inspectors made responsive to similar instructions, *Ex. 6*. It consists of 38 pages. It differs from *Ex. 5* in that the names and addresses are shown, but it also differs in that it constantly refers to two different subjects, the fill of container of canned shrimp and of canned oysters, with greater emphasis on canned shrimp. On direct examination Mr. Callaway had testified from his observations and from these reports (Exs. 5 and 7) that:

“so far as canned oysters are concerned no one had noted any injury to quality of canned oysters due to the increased fill” (R. 30).

However, on cross-examination Mr. Callaway, who offered these exhibits, stated that it is difficult to tell whether they refer to canned shrimp or canned oysters:

*"It was so difficult I thought it best to copy them * * * . * * * As a matter of fact, if I had realized it, I think I would have had the reports kept separate because * * * it is sometimes difficult to tell how much of what they are saying applies to oysters."* (Callaway, R. 43-4)

It was impossible for petitioner and others to meet or challenge such hearsay statements. However, the Administrator, in his First Final Order, relies on these same Exs. 5 and 7 and on Mr. Callaway's direct testimony, and on his own interoffice communications, Ex. 4 and 6, as supporting his two respective findings No. 5 under the "Identity" and "Container" sections of his order (App. A, pp. 4, 9).

Respondents' Exs. 9, 10, 11, 12, and 21, are statistical container studies made by inspectors of the Food and Drug Administration, alleged to show the possibility of packing Western oysters to the 7 ounce fill. These were made by hand-picking oysters in a slow, studied manner that could not be used commercially (Barnett, R. 415).

(2) By the Western oyster industry:

Oral evidence was offered by 7 witnesses, Messrs. Wiegardt, Kincaid, Esveldt, Clough, Barnett, Bendiksen, and Bailey. They testified generally to the completely different biological nature of the Western and Southern oysters; the Western oyster's particular exclusive suitability for frying; the high food value of

its nectar; its high customer acceptance under existing 5 ounce drained weight requirements; and the rapid deterioration in quality due to discoloration, twisting, breakage, and pressure blemishes if subjected to excessive drained weight requirements in excess of 5 ounces. (Wiegardt, R. 150-153; Kincaid, R. 154-190; Clough, R. 196-279; Bailey, R. 522-534).

The *documentary* evidence of the Western industry consisted of 8 exhibits: Ex. 13, contains photographs to illustrate the Western or Pacific (*ostrea gigas*) oyster. Ex. 18 is a letter from a consumer protesting against inferior quality in a heavier pack. Exs. 14, 15, 16, 17 and 20, consist of 78 pages of detailed statistical cutting data and underlying work sheets reporting on extensive experiments, which confirmed oral testimony that drained weight fills of Western oysters in excess of 5 ounces, result in great deterioration in quality because of discoloration, twisting, breaking, and pressure marks which blemish the oysters. This deterioration increases rapidly as the drained weight content is raised above 5 ounces. It is graphically summarized in the charts (Exs. 14-D, 15-C and 16-D).

(3) *By the Southern oyster industry:*

Only *oral* evidence was offered. Five witnesses, Messrs. Carriere, Jastremski, Sewell, Holcombe, and Strasburger testified generally to the problem of the Southern industry since 1942, when they agreed to comply with the 7½ ounce limitation of the Tin Conservation Order; that compliance had greatly impaired quality, resulting in a compressed ball, matted like dog food; the past high consumer acceptance that

had been enjoyed by the 5 ounce drained weight fresh-opened, pre-cooked or blanched Southern oysters during a marketing period from 1936 to 1942 under a 5 ounce drained weight; that it had abandoned fresh-opened or blanched Southern oysters because it was impossible to put more blanched oysters into a can than to yield a 5 ounce drained weight, and hence that it was not possible to continue this superior pack under the 1944 order (Carriere, R. 453-5; Holcombe, R. 554-5, and Callaway, R. 46).

No *documentary* exhibits or container studies were offered by the Southern industry in support of their "proposal" or "application" for reduced drained weights of their products (Ex. 6).

(B) Additional pleadings and papers submitted to Administrator re First Final Order.

The Administrator's certification of the record contains 17 other documents (*Orig. Vol. I, items 1 to 17*). They are arranged by him in inverse chronological sequence and include: item 17, notice of hearing; item 15, tentative order dated October 4, 1947; items 11 and 12, exceptions on behalf of petitioner and others to tentative order; items 8 and 10, petitions for additional hearings to be held on the West Coast; item 7, brief of Mr. Hugh B. Mitchell requesting a postponement and reconsideration of tentative order; Items 4, 5, and 6, orders of Administrator and letter of Administrator, all dated March 10, 1948, denying most of the exceptions, and denying Mr. Mitchell's request

for postponement and reconsideration,^{11a} and item 3, the First Final Order dated March 10, 1948 (herein reproduced as App. A), which by its terms was to become effective 90 days thereafter, or on June 11, 1948 (App. A, p. 13).

The Administrator certified that he signed the First Final Order of March 10, 1948 on the basis of this evidence and these pleadings (*Orig. Vol. II, item 1*).

On April 29, 1948, prior to the effective date of said order, petitioner filed its petition for further consideration, reopening, reconsideration, revision and oral argument (*Orig. Vol. I, item 2*). This was denied by the Administrator's letter dated May 25, 1948 (*Orig. Vol. I, item 1*).

(C) This Court's order of remand

On May 22, 1948, petitioner filed its petition for judicial review and other relief. This court, after hearing and consideration of pleadings and affidavits, issued its order of June 8, 1948, remanding the proceedings to the Administrator to take further evidence with respect to petitioner's new method of blanching oysters.

(D) Evidence offered at July, 1948, hearings

At the opening of the further hearing the Administrator's Presiding Officer stated that the hearing was called pursuant to this court's decree to take further evidence relating to:

^{11a}The record does not disclose action denying petitions for additional hearings to be held on the West Coast. Suffice it to say, the Administrator refused to hold such hearings.

“* * * an alleged new method of preparing oysters for canning by blanching fresh-shucked oysters and as to the proper standards of fill of container for oysters canned after such preparation, *which alleged new method is proposed by Willapoint Oysters, Inc., in connection with the definitions and standards of identity and standards of fill of container for canned oysters.*” (Goding, R. 703).

The Presiding Officer then stated:

“Evidence will first be taken from Willapoint Oysters, Inc., *proponent* of the alleged new method of packing blanched oysters, and as to the relationship of such method to a reasonable standard of fill of container for canned oysters.

“Following such evidence, evidence in rebuttal thereof will be received.”

Counsel for petitioner reserved on the record the question of whether petitioner was “proponent of a rule or order” within the meaning of the Administrative Procedure Act,¹² but stated that in any event petitioner was prepared to go forward (R. 703-5).

Proof was confined to the new method of blanching oysters (Goding, R. 705; Bailey, R. 725), and did not relate to other matters in which the petition for judicial review had challenged the validity of the First Final Order.

The following summary of evidence is similarly arranged in sequence of proof.

¹²55 U.S.C.A. (Supp.) 1006(c), provides in part: the “proponent of a rule or order shall have the burden of proof.” This will be discussed in the Argument section, *infra*, pp. 113-116.

(1) By petitioner, Willapoint Oysters, Inc., and others of the Western canned oyster industry:

The *oral* evidence consisted of testimony by Mr. Bailey (R. 713-49). It showed generally the history of the development of the new blanching process; that it was first adopted for commercial use on September 22, 1947; that since adopting it petitioner has packed over 2 million cans; that petitioner presently accounts for more than 50 per cent of the total commercial output of all types of canned oysters in the Pacific Northwest; that as a result of the new blanching process the color of the meat is improved over the steam-opened oyster, the liquid being as clear as the steam-opened oyster, the shape retained without deformation, and the flavor greatly improved over the steamed oysters; that "it more nearly resembles the fresh oyster than any canned oyster ever packed in history on either coast" (Bailey, R. 717); that the Southern pre-steaming process results in a great dehydration, whereas the blanching process may be used on either the Pacific or Gulf Coast oysters and retains its high quality of flavor because all but 2 or 3 per cent of the natural body content of the oyster after blanching is retained in the canned oyster (Bailey, R. 719); that in pre-steaming the effect is to drive out of the oyster its natural body juices which contain much of the flavor, vitamins and mineral content of the oyster; that there have been many favorable consumer comments on the better flavor of the blanched product, and has not been a single consumer complaint; that the Southern industry had previously testified they enjoyed similar consumer

acceptance when they had canned their raw-shucked oysters at 5 ounce drained weight, prior to forced abandonment due to Tin Conservation Order, because it was impossible to pack fresh-opened Southern oysters in excess of 5 ounces (R. 722); that the advantage of the blanching process is to retain the natural elements of the oyster as nearly as possible in the can, comparable to retaining the juice in the fresh orange, as contrasted with dried or dehydrated orange pulp (R. 725); that its Western blanched oysters are not sold generally in the same trade channel as canned Gulf or Cove oysters, because 70 per cent of the Gulf pack is sold in the East and Middle West, whereas 70 per cent of the blanched oyster pack is sold in the three Pacific Coast states, and 98 per cent of the entire Western pack is sold west of the Mississippi River, with only 2 per cent being sold in the highly settled eastern part of the United States (Bailey, R. 726); that it is his honest judgment that the First Final Order of the Administrator would *not* support honesty and fair dealing in the interest of consumers, but would result in a highly disadvantageous canned oyster product which would ignore flavor, resemblance to the natural product, and quality, and would be comparable to prohibiting the canning of fresh peas because of their liquid content as compared with dried peas (Bailey, R. 730); and that experience has shown repeatedly that it is impossible to can blanched oysters so as to comply with the increased standard of fill without a substantial impairment of quality due to increased browning, deformities, and pressure (R. 731); that he has been

in the oyster business for 17 years and has tried to live up to the highest ethical requirements of the business and to all of the applicable standards of the Federal Food, Drug, and Cosmetic Act, and that he sincerely believes that the best interests of consumers would be advanced by authorizing both Western and Southern packers to can blanched oysters at a uniform standard of 5 ounce drained weight (R. 748).

The *documentary* evidence offered by petitioner consisted of 8 exhibits, all of which were in affidavit form.

Ex. 25 outlines the method of preparing blanched oysters and detailed the facilities granted Inspector Hansen of the Food and Drug Administration to put up a test pack of canned "blanched" oysters, and states the disposition of that pack.

Ex. 26 relates to the further disposition of that pack and as to the method of packing certain designated brands of oysters.

Ex. 27 is the affidavit of Dr. Ray W. Clough who had previously orally testified at the June 1947 hearings. It shows analyses of the deterioration found in oysters packed by Inspector Hansen (*Exs. 25, 26*) to meet an increased fill. To this affidavit are appended two brief corroborating affidavits by other participants in Dr. Clough's detailed experimental studies.

Ex. 28 is a detailed report by Dr. David B. Charlton, reporting on a food value comparison made of Western oysters packed by the blanching process, and by the pre-steaming process, and of Southern packs of Cove oysters; together with the reports on a taste

quality Consumer Acceptance Test appraising the comparative consumer reaction to these three different types of canned oysters. The participants in this test were well qualified and impartial women, 2 of whom are specialists in domestic science and 1 a typical housewife. They were not known to petitioner or any of its associates. Their appraisal was based on preparation of oyster stew and of fried oysters by standard recipes. Each brand was graded as to appearance, texture, and flavor, both of the oyster and of the broth. Comments both favorable and unfavorable were made as to each brand, the identity of which was known to the women participants only by number. No. 2, Willapoint, was unanimously chosen as the best of the 3 brands (App. E, pp. 42 to 44; 47 to 50).

Ex. 29 is the affidavit of Laucks Laboratories, Inc., as to the chemical content of oysters. It shows the high protein and solid content in the liquid of Willapoint oysters as contrasted with Surf Maid Southern oysters (App. E, pp. 51-52).

Ex. 30 is the supplemental affidavit of Dr. Charlton reporting on a chemical analysis of Willapoint canned oysters, Code No. 115L (App. E, p. 31). These oysters are shown to have been packed by the blanching method (App. E, p. 42; Ex. 25, p. 2). It further shows that the liquid portion of these blanched Willapoint oysters has a significant food value quite comparable to the entire contents of other well known canned foods, including canned green and wax beans, canned peas, canned clam bouillon, and canned Campbell's beef broth bouillon (App. E, p. 53).

These last 3 exhibits, Nos. 28, 29 and 30, were virtually ignored by the Acting Administrator in his Second Final Order, and are for convenience reproduced in full text herein as Appendix E.

An additional eight exhibits, Nos. 37 to 44, were affidavits proffered by counsel for other West Coast packers. Exs. 37 and 38 show the difficulty of packing experienced by them in efforts to comply with the 6½ ounce fill required by the First Final Order of March 10, 1948. They are supported by photographs illustrating the scattering of salt tablets and littering of the floor with pieces of oysters and protrusion of oysters above the seal of the can before being sealed. Exs. 39 to 44, except No. 42 were affidavits offered in evidence on behalf of these other Western packers but refused admission. Ex. 42 is the affidavit of a woman oyster packer in the plant of one of these West Coast packers counteracting certain oral testimony offered by Mr. Hansen of the Food and Drug Administration (R. 866). The rejected exhibits are set out as Appendix F, *infra*.

(2) By the Acting Administrator:

The *oral* evidence consisted of testimony, principally by two witnesses for the Food and Drug Administration, Messrs. Callaway and Hansen, and of four minor witnesses who gave very brief corroborative testimony. They testified generally in opposition to modifying the prior findings, *supra*, n. 11.

The *documentary* evidence by the Administrator consisted of 8 exhibits, one of which, *Ex. 22*, is the formal announcement of the further hearing; two,

Exs. 23 and 24, are single page affidavits by very small western producers (R. 1052-3, 1058); one, *Ex. 31*, is the label used by petitioner, Willapoint Oysters, Inc., showing the term "OYSTERS" and "NET DRAINED WT. 5 OZ. OYSTER MEAT"; one, *Ex. 32*, consists of a group of photographs of opened cans of oysters; two, *Exs. 35 and 36*, were specimen blank samples of work sheets used.

Ex. 33 is the principal exhibit of the Administrator. It is a so-called master sheet which purports to set out data contained in underlying work sheets which were not offered in evidence. It was alleged to be honey-combed with error, and utterly unreliable in many details (*Supp. Vol. III*). But it was extensively relied upon by respondents (App. B, Findings 2, 10, 12, 15, 17 and 18).

(3) By the Southern oyster industry:

The *oral* evidence consisted of brief testimony by one witness, Mr. Strasburger. He offered as an exhibit a written statement of Mr. McPhillips of the Southern Shellfish Company. Both the oral testimony and statement were concerned primarily with emphasizing the need for uniform standards of fill (R. 1035-49).

No statistical evidence or data was offered by the Southern industry at either hearing.

(E) Brief and argument submitted by petitioner prior to Second Final Order

At the conclusion of the hearing the Presiding Officer announced that the parties were given 10 days

within which briefs and arguments could be filed (R. 1178).

No brief or argument was submitted by the Southern industry or by the attorneys for the Food and Drug Administration, who had participated extensively in the further hearing (R. 703-1178).

Counsel for petitioner filed such a brief, setting forth 23 requested findings of fact with detailed supporting references to the record, and its argument thereon (*Supp. Vol. III*).

The Second Final Order ignores every single requested finding and the supporting argument which your petitioner submitted to the Administrator (App. B).

SPECIFICATION OF ERRORS

Respondents Hon. Oscar R. Ewing and Hon. J. Donald Kingsley, and each of them, erred by their own actions in issuing, respectively, the *First Final Order* and the *Second Final Order*, and/or by the actions of their designated Presiding Officer, Hon. James B. Goding (Ex. 2), who conducted on their behalf both hearings (R. 4-5, 703); in the following errors which are "*not in accordance with law*,"¹³ and were committed:

"Without Observance of the Procedure Required by Law"¹⁴

(1) In that respondent Kingsley, as Acting Federal

¹³Food, Drug, and Cosmetic Act, §701(f)(3), 21 U.S.C.A. 371(f)(3), *supra*, p. 12.

¹⁴Administrative Procedure Act, §10(e), 5 U.S.C.A. 1009(e)(B)(4), *supra*, p. 17.

Security Administrator, signed the Second Final Order of August 3, 1948, without having previously read and considered in its entirety the record of the prior phase of these same proceedings before the Administrator, respondent Ewing, who had theretofore signed the First Final Order of March 10, 1948; because the Second Final Order purports to rely in part on the evidence and record adduced at the first hearing and findings therein, and to modify the findings and conclusions of said First Final Order; and because respondent Kingsley has certified that he only read and considered the evidence and record at the second hearing (*Supp. Vol. I, item 1*).

(2) In that respondent Ewing, as Administrator, purported to authorize respondent Kingsley to sign the Second Final Order and to certify as to the record thereto, without providing that he also read and consider the evidence and record on which the First Final Order of March 10, 1948, was based, which respondent Ewing alone has certified to having read and considered (*Orig. Vol. II, item 1*).

NOTE: Specifications Nos. 1 and 2 discussed, *infra*, pages 76 to 78.

(3) In that both said respondents erred by the acts of their duly designated Presiding Officer in his conduct of the hearings, as follows:

(a) in permitting Joseph Callaway, the chief witness for respondents and "continuously engaged in * * * enforcement work" (R. 14) of the Food and Drug Administration since 1914, to participate as counsel in cross-examination of witnesses for the industry (R. 353, 368, 392, 398, 420, 422, 425, 602-7,

803-4), for the reason that this is manifestly unfair and violative of procedural due process, and for the further reason that the elaborate questions and statements of Mr. Callaway (e.g. citations to record, *supra*, and R. 383-6, 392-5) make it virtually impossible to determine in the record whether he is testifying under oath as the principal witness, or making unverified observations as a participating counsel; and for the further reason that the Presiding Officer did not permit industry witnesses a similar opportunity to cross-examine Mr. Callaway, but required them to address their cross-examination through counsel (Goding, R. 487);

(b) in sustaining objections by counsel for the Government to questions addressed to Mr. Callaway as to whether he either wrote or had a hand in preparing the Administrator's First Final Order of March 10, 1948, on the grounds that the order is "out over the Administrator's signature as an official document" (Goodrich, R. 960) and that:

"I have been designated to take evidence pertinent to the issues indicated in the notice of hearing. I do not consider that question pertinent to that issue." (Goding, R. 960);

(c) in sustaining the Government's objections to similar questions of Mr. Callaway as to whether he had written so much of paragraph 6 of the First Final Order as relates to browning, and so much of the first sentence thereof as states "browning is a type of discoloration occurring in oysters protruding above the packing medium" (Goding, R. 961-2);

(d) in similarly sustaining an objection to a question addressed to Mr. Callaway as to whether he or Government Counsel had written the third sentence of paragraph 6 of the First Final Order, stating that "excessive entrapped air can be avoid-

ed in good manufacturing process" (Goding, Callaway, R. 985, 991-2);

(e) in declining to permit argument with respect to the relevancy of these questions, and in precluding counsel for petitioner from completing an offer of proof of matters sought to be established by these questions addressed to Mr. Callaway, the first part of which offer, before interruption, read:

"I offer to prove by these questions presently addressed to Mr. Callaway and likewise questions yesterday that: In violation of my understanding of the Administrative Procedure Act, §5(c), the order in issue of March 10, 1948, violates so much of that section as provides that '*save to the extent required for the disposition* of ex parte matters as authorized by law, no such officer (referring to the officers who presided at the hearings) shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate, nor shall such officer—"

and in stating on such interruption that the offer was entirely irrelevant to these proceedings because it referred to exclusively quasi-judicial matters, and that rule making is quasi-legislative (Goding, R. 992-3).

NOTE: Specification No. 3 (a) to (e) discussed, *infra*, pages 79 to 90.

(4) In that both said respondents erred by their own acts and by those of their designated Presiding Officer in his rulings on the following preliminary motions:

(a) in omitting to observe the procedure of the Food and Drug Administration as published in the Federal Register, 11 F. R. 177A-541, 543; 21 C.F.R. 1-4(d), that:

"The Food Standards Committee usually holds

informal public hearings, after appropriate notice, on proposals to formulate definitions and standards of identity for food to be announced for formal public hearings.”

and in overruling the request of counsel for petitioner and others for a postponement for the reason that ordinarily such problems are thoroughly discussed in an informal meeting with the Food Standards Committee some months before the actual formal standards hearing is fixed; and that because this customary procedure was not followed in this case, and because there had been no opportunity to collect data for the first hearing in the month after the notice was issued, adequate standards could not be properly formulated and presented (Castle, Steele, R. 7-8; Goding, R. 10) ;

(b) in denying the motion by counsel on behalf of your petitioner and others that the hearing set for July 10, 1947, be postponed because “the industry has previously had no definite indication that a standard of identity for canned oysters would be fixed, no experimental packs have been made and * * * no consideration of the problems” had been undertaken, and that “after the notice was published * * * no canned oysters have been packed and * * * (it was) impossible to put up any experimental packs” prior to the time of hearing (R. 6-7) ;

(c) in overruling the request of counsel for petitioner that the standard of identity hearing be kept separate from the fill of container hearing since they are two separate standards (Castle, R. 11; Goding, R. 12-13) ;

(d) in overruling objection, made at the conclusion of the taking of evidence on the first hearing, to the promulgating of a standard of identity for

canned oysters until there had been adequate time to collect data on which such a standard could be based (Castle, Steele, Goding, R. 651-2).

(e) in refusing to hold a further hearing on the West Coast.

NOTE: Specification No. 4 (a) to (e) discussed, *infra*, p. 117.

(5) In that both said respondents erred by the actions of their designated Presiding Officer in his rulings on various matters of evidence, as follows:

(a) in receiving into evidence as respondents' Ex. 33, a purported master sheet summary of statistical data, over objection that the original records were not present, although there was testimony that they were available, and in overruling a request that receipt of Ex. 33 be deferred until after cross-examination (Goding, R. 816-7);

(b) in declining a motion to strike a statement by witness for respondents with respect to the chemical content of the brine solution in canned oysters shown on Ex. 33 until the working papers from which the statement was made were available, on the ground that earlier when witnesses for petitioner were testifying respondents insisted that the work sheets be produced, and that the same Presiding Officer had ruled that counsel for the Government:

"may suspend examination of the witness * * * until such time as (the industry witness) has the basic (work sheet) material"

available (R. 262), and that pursuant to such ruling the industry witness left the stand until he was permitted to return (R. 564-5) after having had prepared a 45 page mimeographed copy of work sheets (Ex. 19); and in the further action of the

Presiding Officer in manifesting bias in reiterating his ruling that the work sheets need not be prepared after the foregoing ruling was recalled to his attention (Goding, R. 857);

(c) in requiring cross-examination to continue with respect to work sheets recognized by him and by counsel for the Government to be "not in evidence" (R. 921);

(d) in overruling the request of petitioner that the work sheets supporting Ex. 33 be offered in evidence while at the same time granting the Government's request to insert thereon certain data derived from said work sheets which had been omitted in its preparation (Goding. R. 999), but denying to petitioner the right to have similar corrections made (Goding, R. 911);

(e) in refusing to receive in evidence the work sheets on which Ex. 33 was based (R. 1000-4); and in refusing to give the work sheets an identification number so that subsequent review may be had of the propriety of the Examiner's ruling in excluding them (R. 1004-6); and in ruling that the request for placing the work sheets in the record is denied on the ground that the Administrator "has complete authority over all official records in the Agency and can, himself, then place them in the record" (R. 1009); and in the Acting Administrator's omission and refusal to read or consider the work sheets (*Supp. Vol. I, item 1*); and in his refusal to place them in the record (*Supp. Vol. I-IV*).

NOTE: Specifications Nos. 5(a) to (e) discussed, *infra*, pages 100 to 102.

(f) in overruling a motion to strike a statement by a witness for respondents purporting to quote a woman employee at a plant in Willapa Harbor;

Washington, who was alleged to have said that she had no difficulty in packing an increased fill, and has had experience with both steamed and blanched oysters and claims that it is as easy to pack one as it is the other, on the ground that it is hearsay and that there was no opportunity to cross-examine this woman (Hansen, Goding, R. 866); and in thereafter relying on such evidence¹⁵ and neglecting to give any consideration to, or to make reference to, an affidavit of said women which disclaimed such statements (Ex. 42); and on rejecting other pertinent rebuttal affidavits (R. 1166-77; *infra*, App. F, pp. 54 *seq.*)

(g) in overruling a motion of petitioner to strike a statement by a witness for respondents with respect to alleged unfavorable comments of buyers as to blanched and steamed oysters, on the ground that it is hearsay, that it is not supported by affidavit or other verification, or by explanation of what is meant by the term "unfavorable" (R. 879-880);

(h) in overruling counsel for petitioner's motion to strike the statement of Mr. Callaway with respect to the results of a visual appraisal made by him and others, purportedly as their collective opinions, on the ground that no report was available or way of evaluating the method by which the visual appraisal was made (Goding, R. 800-2);

(i) in overruling an objection to testimony purporting to report the collective opinions of several persons that oysters prepared by blanching were "indistinguishable from pre-steamed oysters in odor, taste and appearance, but that the liquid from the cans of blanched oysters was less attractive

¹⁵App. B, Finding 16, p. 21.

than the liquid from the pre-steamed oyster," on the ground that there was no factual data upon which the accuracy of such general statements can be predicated or appraised (Goding, R. 802);

(j) in overruling a motion to strike testimony that "the liquid from the cans prepared from blanched oysters contained sediment material which made the liquid cloudy in appearance. In this it differed somewhat from the clear liquid in canned oysters prepared for canning by the pre-steaming in the shell," on the ground that there is no substantiating testimony of any quantitative or measurable kind whereby petitioner can in any way appraise the statements and that no documentary evidence had thus far been offered to support such a statement (Callaway, R. 803; Goding, R. 805);

(k) in improperly ruling and in manifesting bias by interjecting in the absence of objection by opposing counsel, the Presiding Officer's own interruption and objection to a question by counsel for petitioner, reading as follows:

"Q Now, in order to make this organoleptic examination with respect to appearance, did you then proceed with your various trays there to stir or agitate the liquid in the pre-steamed and the blanched to come to a unanimous conclusion with respect to its having what you term—"

and to the Presiding Officer's statement that:

"I, on my own initiative, suggest it is argumentative. I rule it out." (R. 904)

NOTE: Specifications Nos. 5(f) to (k) discussed, *infra*, pages 92 to 96.

(l) in refusing to permit receipt in evidence for subsequent court inspection of representative cans of oysters so that the court might have before it some tangible evidence of the matter in dispute

with respect to deterioration of quality through browning, twisting, and pressure marks in cans of oysters required to be packed with an excessive fill of oysters (Goding, R. 1023, 1027-30);

NOTE: Specification No. 5(1) discussed *infra*, pages 102 to 104.

(m) in unlawfully *imposing* on petitioner a burden of proof as to *increased* standards for Western oysters (Goding, R. 704), and in having *relieved* Southern producers of a burden of proof to justify their "application" or "proposal" (Ex. 6) for *reduced* standards (Goding, R. 11-12);

NOTE: Specification No. 5(m) discussed *infra*, pages 113 to 116.

In that the following errors are further "*not in accordance with law*,"¹³ and constitute portions of findings which are:

"Unsupported by Substantial Evidence":¹⁴

(6)¹⁵In Finding No. 1 that:

The common name of the *ostrea virginica* species, when canned, is "Oysters" or "Cove Oysters," and that oysters of the *ostrea gigas* type are commonly known as "Pacific Oysters," to the extent that it omits to find that oysters of the *ostrea gigas* species are and also have long been "commonly known," "when

¹³Food, Drug, and Cosmetic Act, §701(f)(3), 21 U.S.C.A. 371(f)(3), *supra*, p. 12.

¹⁴Administrative Procedure Act, §10(e), 5 U.S.C.A. 1009(e)(B)(5), *supra*, p. 17.

¹⁵Specifications Nos. 6 to 18 relate to Findings Nos. 1 to 8, inclusive, under Definitions and Standards of Identity, in the First Final Order of March 10, 1948 (App. A, pp. 2 to 7, inclusive).

canned", as "Oysters", and omits to find that petitioner has for the past 16 years (Bailey, R. 755) used the label offered in evidence by respondents which clearly indicates that its product has been labeled and commonly known as "OYSTERS" and not as "Pacific Oysters" (Ex. 31), and that the only other label of record similarly identified by respondents, reads "TILLAMOOK BRAND FANCY SELECT OYSTERS", and not "Pacific Oysters" (Rowe, R. 634); and to the extent the finding omits reference to testimony of the chief witness for the Administrator that the food is "*ordinarily known*" as "*canned oysters*" (Callaway, R. 72).

(7) In Finding No. 2 that:

"the methods used for canning Eastern oysters and Pacific oysters are essentially the same", when in fact the record does not disclose any canning of Eastern oysters, and in omitting to find as to Southern oysters or Cove oysters, that the methods are radically different from those used for Western or Pacific oysters. The finding should have been that the methods used for canning Southern or Cove oysters and Pacific or Western oysters are radically different because of the differences of biological characteristics of the oysters and the widely different heat, pressure, and temperature and processing methods to which they are subjected (e. g., Carriere, R. 453; Bailey, R. 714-717).

(8) In omitting to modify Finding No. 2 of the First Final Order to show that Willapoint Oysters, Inc., a large producer (Bailey, R. 714-717), and two small Western canners (Hansen, R. 1051-3), are pres-

ently using the blanching system, and in omitting to find that the pre-steaming method used by other Western canners is radically different from the method employed in petitioner's blanching system (Hayes, Ex. 25), and is similar to a method used pre-war by the Southern packers with high consumer acceptance but abandoned by them in 1942 when the Tin Conservation Order became effective because they could not continue such a quality pack under an increased fill above 5 ounces (Carriere, R. 457; Holcombe, R. 555; Strasburger, R. 1045-1048).

(9) In Finding No. 3 that:

“salt may be added for seasoning”,
when the record shows that salt is always added for seasoning so as to form a brine solution, and that the degree of salinity has a marked effect on the quality of the product (Bailey, R. 768-9, 771).

(10) In Finding No. 4 that:

“Eastern oysters are commonly canned whole,”
when the record shows that no Eastern oysters are canned, and further shows that Pacific or Western oysters are also commonly canned whole. The sentence is slanted and distorted and should properly read: “both Southern and Pacific oysters are commonly canned whole” (App. C, Finding 12, p. 29).

(11) In Finding No. 5 which again refers to canned “Eastern” oysters when in fact all of the evidence shows that it is canned Southern oysters that are marketed and sold; and in finding that they “are sold in the same trade channels” as Western or Pacific oysters. The great bulk of distribution of canned West-

ern or Pacific oysters is on the West Coast, and over 98 per cent are sold West of the Mississippi River. Southern oysters are chiefly sold east of the Mississippi River in the populous eastern section of the United States. It is true that to a degree Southern oysters have invaded the Western territory (Bailey, R. 726, 794).

(12) In Finding No. 5 in relying on mere rumor and hearsay (Ex. 4, 5, 6 and 7) which was incompetent.

(13) In omitting to state in Finding No. 5 that canned *Southern* oysters, being small, are generally used for oyster stews and *are not suitable for frying* (Holcombe, R. 556; Jastremski, R. 519), and in omitting to find that Pacific oysters, being larger, are generally well adapted to frying and may also be used for stews (Bailey, R. 535, 726; Callaway, R. 39-40; Charlton, Ex. 28, 30).

(14) In Finding No. 6 that the watery liquid surrounding the oysters is usually discarded if oysters are used for frying. This is contrary to the record.

(Kincaid, R. 185; Bailey, R. 728-9; Charlton, Ex. 30).

(15) In Finding No. 7 that:

“raw oysters are packed directly into the container”

and in stating that:

“raw oysters may be blanched and packed in containers with the liquid in which they are blanched as a packing medium”,

because the evidence is directly contrary (Bailey, R. 729).

(16) In Finding No. 8 (App. A, p. 5) in omitting to find from undisputed evidence that: The flavor of canned oysters properly packed by the blanching process is, in the judgment of the only consumer witnesses who testified in this proceeding, far superior to any other pack [Charlton, Ex. 28 (App. E. hereof, p. 44); Callaway, R. 46; Holcombe, R. 555; Carriere, R. 457; Bailey, R. 722; Cf. Hansen, R. 1104-5].

(17) In finding in the Conclusion (App. A, §36.5 (b)), that:

“canned oysters include a packing medium of water or watery liquid draining from the oysters before or during processing”

and in omitting to consider the high food value content of the packing medium (Ex. 29, 30; App. D, §379, p. 40).

(18) In finding in the Conclusion (App. A, §36.5(c)), that when canned oysters are prepared of the species *ostrea virginica*, the name of the food is “Oysters” or “Cove Oysters,” whereas when they are prepared of the species *ostrea gigas*, the name of the food must be altered to “Pacific Oysters.”

(19)¹⁶In Finding No. 3 that the increased fill caused some minor manufacturing difficulties. The evidence shows that the increased fill under the Tin Conservation Order required a complete abandonment of a fresh-opened raw pre-cooked oyster which had therefore enjoyed the greatest degree of acceptance of any Oyster in the history of the Southern industry (Holcombe, R. 555; Carriere, R. 457).

(20) In Finding No. 4 that canned Pacific oysters are not subject to the requirements of the existing standard of fill of container. It should have found that they are not subject to the 1944 order, but are subject to prior lawful orders fixing a 5 ounce standard of fill (*supra*, pp. 18-21).

(21) In Finding No. 5, that:

“canned Pacific oysters were often labeled to show the total weight of oysters but not the drained weight of oysters,”

and in omitting to show that such practice was (a) expressly authorized by Food and Drug Administration decisions (App. D, p. 38, and 40, Op. 88 and 379), and (b) that in the further hearing of July 1948 counsel for respondents brought out that petitioner, the largest packer of Western oysters, had voluntarily placed on its label the imprint “Net Drained Weight 5 Ounces Oyster Meat” (R. 755, 759), and that counsel for respondents offered in evidence Ex. 31 which confirms that contrary to the statement in Finding No. 5, petitioner’s oysters are now voluntarily labeled to show the drained weight as well as net weight. This finding is further contrary to the evidence in conveying an impression that some brands of Pacific oysters are not labeled, and by an omission to state anything with respect to Southern oysters to convey the impression that they are uniformly labeled to show drained weight. There is nothing in the rec-

¹⁶Specifications Nos. 19 to 31 relate to Findings Nos. 1 to 8, inclusive, under Standards of Fill of Container in the First Final Order of March 10, 1948 (App. A, pp. 7 to 13, inclusive).

ord to support such an inference. Finding of Fact No. 5 is further in error in finding that a "condition" exists which is likely to confuse and deceive consumers in that it is impossible to know to what "condition" this sentence refers, particularly in view of the fact that one of the principal antecedent sentences relating to labeling of canned Pacific oysters is shown to have been contrary to the evidence; and further in error in relying on mere rumor and hearsay (Ex. 4, 5, 6 and 7).

(22) In Finding No. 6 in omitting to show that experimental packs sponsored by canners of Pacific oysters showed that there was a serious impairment of quality when drained weights in excess of 5 ounces theretofore prescribed for such oysters were used (Esveldt, R. 308; Ex. 14-17; Ex. 27); and in finding that the assignment of demerits was made on an arbitrary basis; and in omitting to find that a merit system basis of evaluating quality is not arbitrary but, on the contrary, is standard practice in the food industry (*Supp. Vol. III*, pp. 13-14).

(23) In Finding 6 (the first unnumbered paragraph), that browning can be eliminated by the removal of excessive entrapped air. This is contradictory to the first sentence, which indicates that browning occurs when oysters protrude above the packing medium. It is contrary to the evidence in suggesting that West Coast operators do not follow good manufacturing process (Hansen, R. 1090-1; 1059). It is further in error in suggesting that liver spots are commonly found on canned Pacific oysters. They are more commonly found on canned Southern oysters (Callaway,

R. 479-81; Bailey, R. 731). It is in error in suggesting that browning is not as noticeable as liver spots. It is more noticeable and is the greatest single defect in marketing (Bailey, R. 731).

(24) In Finding 6 (the third unnumbered paragraph), in stating that pressure marks are not unsightly and in omitting to state that they are blemishes and that they do affect the appearance of the oysters (Bailey, R. 732).

(25) In Finding 6 (the fourth full unnumbered paragraph) in omitting to show that the Pacific oyster is susceptible to breakage and by such omission to contradict the finding of respondent of the Second Final Order (App. B, p. 17, Finding 9).

(26) In Finding 6 (the fifth full unnumbered paragraph), that there is no significant correlation between these various blemishes and the drained weight of oysters (Clough, Esveldt, Ex. 14-17).

(27) In Finding 6 (the last full unnumbered paragraph), in omitting to take into consideration at all the evidence offered by petitioner in Ex. 28, 29 and 30 with respect to quality (App. E hereof).

(28) In Finding No. 7 that pre-steamed or blanched Pacific oysters can be packed to as high a weight as 11 ounces into the standard 10½ ounce can which, after processing, yields 6½ ounces without impairment of quality due to the fill (Clough, Esveldt, Ex. 14-16; Bailey, R. 733).

(29) In Finding No. 8 in omitting to show that in no event could technique employed in hand selecting the test pack made experimentally by an inspector

of the Food and Drug Administration be used commercially (Esveldt, R. 315).

(30) In that each of the Conclusions set forth in the First Final Order is contrary to the evidence for reasons shown above and for the omission to state that "the return to the fill in use prior to 1942" would be a return to a 5 ounce fill promulgated and approved by successive rulings of the Food and Drug Administration and its predecessors (App. D).

(31) In that the ordering paragraph of the First Final Order (App. A, pp. 12-13) is void because not supported by substantial evidence.

(32)¹⁷ In that each of the Findings Nos. 1 and 2 (App. B, pp. 15-17) and Nos. 9 to 18 (App. B, pp. 17-22), and Conclusions based thereon and ordering paragraph made thereunder (App. B, p. 23), is not made:

"on the basis of evidence of record" (App. B, p. 23),

as recited therein, but is in fact based only upon a consideration of pages 703 to 1178 and Exhibits 22 to 42 of "the evidence of record" (*Supp. Vol. I, item 1*).

(33) In Finding No. 1 (amending former Finding 6) in that it omits to find with respect to the liquid packing medium that:

"the liquid portion of Willapoint canned oysters has a significant food value quite comparable

¹⁷Specifications Nos. 32 to 36 relate to Findings Nos. 1 to 2, inclusive, under Definitions and Standards of Identity, in the Second Final Order of August 3, 1948 (App. B, pp. 15-17).

to the entire content of other well known canned foods”

as specifically requested in the proposed findings of fact submitted by petitioner (*Supp. Vol. III*, p. 4), and as shown in the record before him (App. E, p. 53).

(34) In Finding No. 2 (amending former Finding 7) by omitting to show in Footnote 2, thereof, with reference to experiments by Willapoint Oysters, Inc., that extensive experimental work was done earlier on its behalf with respect to pre-steamed oysters (Clough, Esveldt, Ex. 14-17); and that blanched oysters are shown by the evidence to have a larger content and lesser shrinkage than steamed oysters covered by such experiments [App. A. of Ex. 28 (App. E hereof, p. 45)], which experiments confirm knowledge of the impossibility of increasing the fill of blanched oysters beyond the 5 ounces drained weight, and by omitting to refer to a typical consumer complaint as to a “solid mass with no liquid” (Ex. 18) when petitioner had experimented with the heavier pack (R. 527).

(35) In Finding No. 2 that canned oysters prepared from blanched oysters are practically indistinguishable from those prepared from oysters that have been pre-steamed in the shell in that such evidence is completely contrary to the record, and gives credence, with studied design, to the testimony of the Administrator and ignores all of the evidence relating to this subject offered by petitioner, and particularly Ex. 28 (App. E hereof), which reported the only objective and non-partisan study of con-

sumers' wishes with respect to canned oysters, and which reported that the blanched Willapoint oyster was determined to be the best oyster of three representative brands of oysters, one of which was the blanched Willapoint oyster, the second the steamed Western oyster, and the third the Southern oyster, and in completely ignoring facts shown in petitioner's brief to the Administrator (*Supp. Vol. III*, p. 5, Proposed Finding No. 10).

(36) In Finding No. 2 and 12 that the loss in weight approximates 16 per cent, when the evidence showed that in the blanching process the oysters shrink in volume an average of 2.76, whereas in the steaming process the oysters shrink in volume 16.66 per cent (App. E, p. 42).

(37)¹⁸ In Finding No. 9 that Pacific oysters prepared for canning by the blanching method are no better than canned Pacific oysters prepared for canning by pre-steaming in the shell, in that it totally ignores Ex. 28.

(38) In Finding No. 9 that large scale purchasers are alleged to regard certain oysters as inferior because it was based on pure hearsay and rumor which was received over objection of counsel for petitioner, and which counsel for petitioner had no way of counteracting or meeting (Hansen, R. 879-880).

(39) In Finding No. 9 (the third to fifth sentences) (App. B, pp. 17-18) relating to labeling and adver-

¹⁸Specifications Nos. 37 to 58 relate to Findings Nos. 9 to 18, inclusive (under Standard of Fill of Container), in the Second Final Order of August 3, 1948 (App. B, pp. 17 to 23).

tising the blanching method, in omitting to state that the absence of advertising and changed labeling has been due to the very uncertainty which petitioner is suffering because of the instant litigation and of the refusal of the Food and Drug Administration to permit it to market its quality pack (Bailey, R. 759, 1138).

(40) In Finding No. 10 in purporting to refer to certain designated pages of the first transcript although he had subsequently certified that he read only the second transcript, and in stating that the total quantity of the liquid which separates, based on the weight of raw oysters, is the same whether the oysters are packed into the can raw, or are given a partial cooking in boiling salt water prior to placement in the can, or partly cooked in the shell by steaming, in that with studied design it totally omits to refer to the scientific experiments conducted on behalf of petitioner [Charlton, Ex. 28 (App. E, hereof, p. 42)].

(41) In Finding No. 11 in suggesting that raw oysters are packed without water, producing a murky liquid which is objectionable to many purchasers, in that the statement is supported by a record reference to *unblanched* raw oysters and has no bearing whatever on the issues before the Administrator on rehearing which were confined to the packing of *blanched* raw oysters (R. 703).

(42) In relying upon Ex. 33 and the direct evidence in support thereof, and in omitting to refer to contradictory evidence with respect thereto shown sub-

sequently by cross-examination of the witness who offered the same (Callaway, R. 882-1011).

(43) In Finding No. 12 that a lower put-in weight permits a canner to replace 2 ounces of blanched oysters with 2 ounces of water, in that with studied design it ignores the fact that the order outstanding would require petitioner to put 9 ounces of oysters into its can and $1\frac{1}{2}$ ounces of water to yield a drained weight of $6\frac{1}{2}$ ounces of superior blanched oysters (App. B, p. 19, Finding 12), whereas under the existing order with respect to steam-opened Southern oysters, Southern producers are permitted to reduce the amount put into a can from a prior standard of $7\frac{1}{2}$ ounces to a new standard of $6\frac{1}{2}$ ounces of oyster, and to increase the amount of water added to the can from 3 ounces previously authorized to 4 ounces (App. C., p. 27, Finding 9).

(44) In Finding No. 13, that with heavily pre-steamed oysters a put-in weight of around $7\frac{1}{2}$ ounces will yield approximately 7 ounces. The figures should be just reversed. With the heavily pre-steamed Southern oysters a put-in weight of around 7 ounces will pick up additional weight and yield $7\frac{1}{2}$ ounces (Callaway, R. 978; Holcombe, R. 561). The finding omits to show that under the challenged orders the Southern producers would be permitted to place over 100 per cent more brine into the can than would the Pacific producers (See Specification No. 43).

(45) In Finding No. 14 (App. B, p. 20) that the put-in weight of oysters is not an accurate measure of fill of container for canned oysters because all

oysters are not pre-cooked to the same degree, and in omitting to state that the put-in weight is the prescribed method for measuring contents of many canned foods, such as most canned fruits.

(46) In Finding No. 15 that the liquid draining from oysters has little food value and comes largely from water added as a packing medium and in so doing to ignore its own prior finding in Finding No. 12 that at least $2\frac{1}{2}$ ounces of the liquid comes from the oysters themselves and not from the water, and in omitting to consider its prior determination that the "liquid has certain food value" (App. D, p. 40), and in omitting to consider Ex. 30 which showed that the "*liquid portion* of Willapoint canned oysters has a significant food value quite comparable to the *entire contents* of other well known canned foods" (App. E, p. 53).

(47) In Finding No. 16 that canned oysters which yield 5 ounces are slack filled and in referring by footnote therein to Ex. 32. The record shows that the photographs shown in Ex. 32 were taken at an angle, that the oysters were drained and shifted, and that it is impossible to tell from photographic inspection the fill or the degree to which oysters had been blemished by overfill, and further afford no basis of comparison with Southern oysters as reduced from $7\frac{1}{2}$ ounces to $6\frac{1}{2}$ ounces by the Administrator's order (Nicholson, R. 836-8); and in ignoring the photographs shown in Ex. 38, which show the waste and destruction of oysters incident to efforts by a Pacific Coast packer to comply with an excessive $6\frac{1}{2}$ ounce drained weight.

(48) In Finding No. 17 (App. B, pp. 21-2), that:
 “the factors of quality in canned oysters most important to consumers are not disclosed by the record,”

in that it is directly contrary to the record and ignores Ex. 28, which found that Willapoint Oysters packed by the blanching process were judged best in an impartial Consumer Acceptance Test by three competent and disinterested participants (App. E, pages 42-44; 47-50).

(49) In Finding No. 18 (App. B, p. 22) in minimizing the difference in flavor and appearance and in the food value of the liquid packing medium of blanched oysters, and in omitting to consider or make any reference to Ex. 28, or in explaining why, if flavor and food value of the packing medium is inversely proportional to the amount of water added, the Final Orders propose to reduce the fill of container for Southern packers so as to permit them to place 6½ ounces of oysters and 4 ounces of water in a can while requiring Western packers to place at least 8½ ounces of oysters and only 2 ounces of water into the can. (See above Specification No. 43)

(50) In each of the Conclusions (App. B, p. 23) for the reason that each of them as set out in the four paragraphs thereof is not supported by the evidence; and in his Order affirming the prior order established by respondent Ewing (App. B, p. 23) in that it is based on findings of fact and conclusions, all of which are not supported by the evidence.

NOTE: Specifications Nos. 6 to 50, inclusive, relating generally to the absence of supporting evidence, discussed, *infra*, pages 91 to 113.

In that the following errors are further “*not in accordance with law*,”¹⁹ and are:

“In Excess of Statutory Jurisdiction;”²⁰

(51) In finding that the “common name of oysters” of the *ostrea virginica* species, when canned, is “Oysters” or “Cove Oysters,” and in finding at the same time that “oysters of the species *ostrea gigas*, commonly known as ‘Pacific Oysters’ are canned in considerable quantities” (App. A, p. 2, Finding 1).

(52) In concluding that when whole oysters are canned the name of the food is “Oysters” or “Cove Oysters,” if of the species *ostrea virginica*, and that the name of the food is “Pacific Oysters” if of the species *ostrea gigas*, for the reason that he has not made requisite findings of fact as to the “common or usual name, so far as practicable” as required by §§401 and 701(e) of the Federal Food, Drug and Cosmetic Act (*supra*, pp. 11-12), and in so doing has prescribed *unreasonable* standards of identity [App. A, p. 5-6, §36.5(c)(1)].

(53) In prescribing an *unreasonable* standard of fill of container for what he has termed “Pacific Oysters” under which petitioner would be required to increase the fill of container by 30 per cent [App. A, p. 12-13, §36.6(a)].

(54) In prescribing unreasonable standards of fill of container for petitioner’s blanched oysters, and in

¹⁹Food, Drug, and Cosmetic Act, §701(f)(3), 21 U.S.C.A. 371(f)(3), *supra*, p. 12.

²⁰Administrative Procedure Act, §10(e), 5 U.S.C.A. 1009(e)(B)(3), *supra*, p. 17.

finding that a reasonable requirement for blanched oysters packed with the blanching process which will promote honesty and fair dealing in the interest of consumers is a drained weight of not less than 59 per cent of the water capacity of the can (App. B, p. 23).

NOTE: Specifications Nos. 51 to 54 discussed, *infra*, pages 116 to 117.

In that the following errors are further "*not in accordance with law*,"²¹ and are:

"Arbitrary, Capricious, and an Abuse of Discretion":²²

(55) In denying (*Orig. Vol. I. item 1*) so much of petitioner's petition of April 29, 1948 (*Orig. Vol. I, item 2*) as sought reconsideration, revision, and oral argument with respect to the First Final Order of March 10, 1948, including among other things, the petition for revision and correction of paragraph 36.5 so as to permit petitioner to continue to use the name "Oysters" (*Orig. Vol. I, item 2*, pp. 20-1).

(56) In acting in an arbitrary and capricious manner in committing all of the errors set forth above in Specifications Nos. 1 to 55, including conduct of a hearing on short notice without adequate opportunity for preparation, refusal to hold a hearing on the Pacific Coast to serve the convenience of West Coast parties, failure to read and consider the entire record, permitting the principal witness for the Administrator to participate in the preparation of an order based on

²¹Food, Drug, and Cosmetic Act, §701(f)(3), 21 U.S.C.A. 371(f)(3), *supra*, p. 12.

²²Administrative Procedure Act, §10(e), 5 U.S.C.A. 1009(e)(B)(1), *supra*, p. 17.

his own evaluation of his own testimony, omitting to give consideration to testimony of petitioner offered both on oral examination and in reliable affidavit form, proposing findings of fact that with studied design give credence primarily to the testimony of respondents, giving dominant weight to their own affidavits and ignoring those of petitioner, and in each of the above specifications manifesting bias, prejudice, and a determination to prejudge the case without considering the merits thereof as presented by petitioner.

(57) In denying the petition filed by petitioner in February, 1948 (*Orig. Vol. I, item 7*), which requested postponement and reconsideration of the order and pointed out therein in extensive detail the arbitrary and unnecessary restrictions imposed on West Coast producers and the threat to the continued growth of a new and healthy industry in the Pacific Northwest (*Orig. Vol. I, item 6*).

NOTE: Specifications Nos. 55 to 57 discussed, *infra*, pages 117 to 119.

And; in that the following errors are further “*not in accordance with law*,”²³ and are:

“Contrary to Constitutional Right”:²⁴

(58) In taking the property of petitioner without due process of law in requiring it to abandon its long-continued use of the term “Oysters” and in conferring *a new and exclusive right* upon Southern

²³Food, Drug, and Cosmetic Act, §701(f)(3), 21 U.S.C.A. 371(f)(3), *supra*, p. 12.

²⁴Administrative Procedure Act, §10(e), 5 U.S.C.A. 1009(e)(B)(2), *supra*, p. 17.

producers to use such a term; and in requiring petitioner to pack its oysters to such an excessive standard of fill as to discolor, disfigure, and distort, and thereby destroy a high customer acceptance which has developed for them; or in the alternative to place on the face of the can a label, indicating that it is "sub-standard," which would likewise destroy petitioner's business [App. C, §36.6(e), p. 32-3] which by the challenged First Final Order became §36.6(d) (See App. A, p. 13).

(59) In conducting its hearings and making its findings and an order in a manner that are violative of judicial due process for all of the reasons enumerated above in Specifications Nos. 1 to 58, inclusive.

NOTE: Specifications Nos. 58 and 59 discussed, *infra*, pages 120 to 121.

ARGUMENT OF THE CASE

Petitioner challenged the validity of the First and Second Final Orders because compliance with these orders would:

- (A) destroy petitioner's long-continued use on its labels of the generic term "Oysters" and transfer to Southern producers the exclusive use and good will of that term; and
- (B) destroy petitioner's quality pack by requiring that an excessive quantity of its Western oysters be crammed into the can with resultant discoloration, disfiguration, distortion, and breakage.

I. Concise Summary

Two entirely different species of *canned* oysters are produced in this country, one primarily in the South and known by the biological term *ostrea virginica*, and the other primarily in the West and known by the biological term *ostrea gigas*. The biological differences go back over millions of years. Both have long been marketed and sold as "Oysters". Both are also variously known, respectively, as "Southern" or "Cove" oysters; and as "Western" or "Pacific" oysters.

The methods of processing and canning these two different species are radically different, the end result being that the Southern or *virginica* species is very greatly dehydrated and shriveled before placing into the can, whereas the Western species is placed into the can in approximately its natural shape, condition and size. In both regions a pre-determined weight of oyster meat is placed into the can and the void spaces are filled with a brine packing medium. Because of

the biological and processing differences, any predetermined weight of dehydrated Southern oysters will subsequently absorb a part of the packing medium after the can has been sealed and placed in the retort for the "sterilization" cook; whereas any like predetermined weight of natural conditioned Western oysters will not so absorb a part of the brine, but on the contrary, will subsequently exude a substantial part of its body ingredients into the brine packing medium after the can has been sealed and placed in the retort for the "sterilization" cook, thereby forming a nectar.

The challenged orders recognize the biological differences by requiring *a new and dissimilar* "*standard of identity*" for each species, which would compel the Western or *ostrea gigas* type, long marketed by petitioner and other Western producers as "Oysters" (and also known by regional names) to be henceforth *only* identified as "Pacific Oysters", while permitting the Southern or *ostrea virginica* type, also long marketed by Southern producers as "Oysters" (and also known by regional names) to enjoy henceforth an exclusive right to use the name "Oysters".

But, having translated the biological differences into new requirements for different names that upset long established practice, the challenged orders then proceed to disregard these same differences of biology and processing, and to require *a new and identical* "*standard of fill*" by requiring that both species be so packed as to yield, after sealing and processing in the "sterilization" cook, an *identical* drained weight of 6½ ounces.

This has never been done and compliance is impossible, because of the biological and processing differences.

The Southern packers fill a standard 10½ ounce can with approximately 6¼ ounces of oysters and 4¼ ounces of brine solution. The Southern oysters will absorb approximately ¼ ounce of brine after the can is sealed, and thus will yield a drained weight of 6½ ounces of oyster meat and a remaining 4 ounces of brine. But the Western packers would be required to fill an identical standard can with approximately 9 ounces of oysters and 1½ ounces of brine. This would be required because Western oysters will exude 2½ ounces of natural body content into the packing medium after the can is sealed, producing a drained weight of 6½ ounces oyster meats and 4 ounces of nectar (made up of the original 1½ ounces brine solution and 2½ ounces of the pure ingredients of the oyster). Such excessive crowding would cause discoloration, disfiguration, distortion, and breakage, and thereby destroy the quality pack of Western oysters, as heretofore marketed by petitioner.

II. Argument²⁵

The extent of judicial review of these two final orders is determined by §701 of the Food, Drug and

²⁵Pursuant to this court's Rule 20(d), Specification of Errors, *supra*, pp. 45 to 73, have stated the full substance of evidence erroneously admitted or rejected. Similarly, the Specifications have stated, "as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous."

To conserve space and keep the brief within reasonable limits, the Argument section will not restate facts and argument set out or referred to therein.

Cosmetic Act, *supra*. It confers jurisdiction on this court to set aside an order if it is "not in accordance with law". The legal tests of judicial review are codified by §10(e) of the Administrative Procedure Act, *supra*. The two final orders are alleged by the pleadings and Specification of Errors to be unlawful in each of the 5 enumerated legal standards of that Act, as follows:

- (A) made without observance of procedural requirements;
- (B) unsupported by substantial evidence;
- (C) in excess of statutory jurisdiction;
- (D) arbitrary, capricious, and an abuse of discretion; and
- (E) contrary to constitutional rights.

These points are discussed in that sequence.

A. The Orders Were Made Without Observance of Procedural Requirements

Respondent Ewing certified in effect that he based his order on the evidence at the first hearing (*Orig. Vol. II, Item 1*) being pages 1 to 701 of the testimony and Exhibits 1 to 21, in issuing his First Final Order. After the remand directed by this court's order of June 8, 1948, to take further evidence, respondent Kingsley²⁶ certified in effect that he based his order on *only* the evidence at the second hearing (*Supp. Vol. I, Item 1*) being pages 702 to 1178 of the testimony

²⁶No legal authority appears to exist for Mr. Ewing to have delegated these duties to Mr. Kingsley (11 F.R. 177-A-518, §1.1; 21 C.F.R. §§1.1, 1.2). While Specification of Error No. 2 challenges the delegation, it is assumed, *arguendo*, to have been lawfully accomplished pursuant to some authorization not known to petitioner.

and Exhibits 22 to 42, in issuing his Second Final Order.

But the Second Final Order by its terms supplemented, modified, and amended the First Final Order (*App. B, pp. 15, 16, 17-23*). Its further findings of fact make frequent reference to *isolated* pages of testimony and to *isolated* exhibits received in the first hearing (*App. B. pp. 18, 19, 20, 22*) which evidence, however, in its entirety had been neither read nor considered by respondent Kingsley (*Supp. Vol. I, Item 1*). In signing the Second Final Order, respondent Kingsley recites:

“*It is ordered*, That no change be made in the definition and standard of identity for canned oysters or in the standard of fill of container established by *my* final order of March 10, 1948.” (*App. B. p. 23*)

But the “final order of March 10, 1948” was not “his” final order. It was that of respondent Ewing (*App. A, p. 13*).

(1) The two successive final orders are unlawful because neither of the respondents conscientiously read or considered all of the evidence. (*See Specifications Nos. 1 and 2, supra, pp. 45-6.*)

These procedural defects are not technical but substantial. *Morgan v. United States*, 298 U.S. 468, 481 (1936). The basic “rudiments of fair play” require a conscientious examination and consideration of the *entire* record by the fact finder. Violation of these requirements is a fatal defect of procedural due process. A unanimous court held:

“*There is thus no basis for the contention*
* * * *that one official may examine evidence, and*

*another official who has not considered the evidence may make the findings and order. * * * It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order. For the weight ascribed by the law to the findings—their conclusiveness when made within the sphere of the authority conferred—rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear.”*

The court held that the lower court had erred in striking out the allegations in paragraph IV of a bill of complaint with respect to these matters. The text thereof is set out at 298 U.S. pp. 474-5, footnote 1. Its language parallels the allegations of petitioner's Second Supplemental Petition for Judicial Review filed in this case. In setting aside the orders, the Supreme Court concluded, at pp. 481-2:

*“The requirements are not technical. * * * the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred.”*

The two instant Final Orders have similarly denied judicial due process and should be set aside for these reasons.

(2) The First and Second Final Orders are unlawful because the findings of fact and conclusions supporting them were not, in truth, made by either respondent, but were in fact, unlawfully prepared by subordinate officers and employees who were also engaged in the performance of investigative and prosecuting functions which led to these orders and who appeared at the hearings as witness and as advocate for the Administrator. (See *Specifications No. 3(a), (b), (c), (d), and (e), supra, pp. 46-48.*)

Mr. Joseph Callaway testified that since 1914 he has "been *continuously engaged in* work which might be called *enforcement work* in connection, first, with the Food and Drug Act of 1906, and later with the Food and Drug and Cosmetic Act of 1938." (R. 14)

He was the principal witness for the Administrator in both hearings.²⁷ He also participated extensively in the cross-examination of industry witnesses.²⁸

Mr. William W. Goodrich appeared as attorney for the Administrator (R. 702). He participated extensively in direct and cross-examination of witnesses in prosecuting the Administrator's case and in resisting petitioner's evidence (R. 707, 720, 736-7, 743, 749-793, *et seq.*, to 1175).

Petitioner sought by cross-examination to show that findings of fact and conclusions in the Administrator's final order were in fact prepared by Mr. Callaway and by Mr. Goodrich (R. 960-2, 991-3).

Objection by Government counsel to such cross-

²⁷See references to his extensive testimony, *supra*, in the Table of Witnesses and Exhibits Before Administrator.

²⁸See Specification of Error 3(a), *supra*, pages 46-7.

examination was sustained by the Presiding Officer, first without stating any reasons (R. 960); later because "it is out over the Administrator's signature as an official document" (R. 960); and still later because it was not "pertinent" to the issues on rehearing (R. 960). Subsequently counsel for the Administrator objected on the ground

"that the order is *signed* by the Administrator, issued by him, *not under his name, but by him*, and the question is improper for that reason." (R. 991)

When Mr. Callaway was asked whether he or Mr. Goodrich wrote portions of the findings, objections were again sustained without reason (R. 992).

Petitioner then attempted to make an offer of proof that the findings and conclusions were written by Mr. Callaway and Mr. Goodrich (R. 993). He was interrupted in this offer and not permitted to complete it. The Presiding Officer stated that §5(c) of the Administrative Procedure Act, *supra*, p. 14, refers exclusively to quasi-judicial matters and has no bearing on this proceeding (R. 993).²⁹

The evidence should not have been excluded. Any presumption of official regularity was thereby rebutted. *Donnelly Garment Co. v. National Labor Relations Board*, 123 F.2d 215, 220, 224-5 (C.C.A. 8, 1941). Petitioner did all that was possible to show the irregularity of these proceedings. In *Powhatan Mining Co. v. Ickes*, 118 F.2d 105 (C.C.A. 6, 1941), the court said, at page 110:

²⁹See Specification of Error 3(e).

“* * * One who has been denied access to information or deprived of the privilege of cross-examination on pertinent matters is not in a position to make an offer of proof as to those matters. Likewise, a reviewing court cannot know what a full hearing might have shown and for that reason is not free to speculate as to the prejudice involved in such an erroneous ruling.”

Petitioner was thus cut off from completing its offer to show the relevance of such evidence (a) under §5(c) of the Administrative Procedure Act, and (b) under the requirements of judicial due process.

(a) Under §5(c) of the Administrative Procedure Act, investigating or prosecuting officials are prohibited from participating or advising in the decisions in this case.

§5(c) of the Administrative Procedure Act, *supra*, pp. 14-15, requires in its third sentence that:

“* * * No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall * * * participate or advise in the decision * * * except as witness or counsel in public proceedings. * * *”

In *Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 227-8 (1943), the court said of the Food, Drug and Cosmetic Act:

“The review provisions were patterned after those by which Congress has provided for the review of ‘quasi-judicial’ orders of the Federal Trade Commission and other agencies, which we have many times had occasion to construe. * * * These considerations are especially appropriate where the review is of regulations of general

application adopted by an administrative agency under its *rule-making power* in carrying out the policy of a statute with whose enforcement it is charged. * * *

This case, decided prior to enactment of the Administrative Procedure Act, 1946, thus recognized that both *quasi-judicial*, or adversary, as contrasted with *rule-making* or non-adversary, orders and regulations may be issued under the Food, Drug and Cosmetic Act. The particular label placed upon a decision by an administrative agency is not conclusive. It is the substance of what the agency has purported to do and has done which is decisive. *Columbia System v. United States*, 316 U.S. 407, 417 (1942).

“But overemphasis upon the mere form of the order may not be permitted to obscure its purpose and effect.”

Powell v. United States, 300 U.S. 276, 285 (1937).

As stated in *United States v. Abilene & So. Ry.*, 265 U.S. 274, 289 (1924):

“Every proceeding is adversary, in substance, if it may result in an order in favor of one * * * as against another.”

In enacting the Administrative Procedure Act, Congress recognized that there is a wide range of “rule-making” ranging from broad non-controversial matters to highly adversary proceedings. The Act was based on the Final Report of the Attorney General’s Committee (1941), Sen. Doc. 8, 77th Cong., 1st Sess. In discussing rule-making that report stated, at pages 108-110:

“Hearings in rule-making are usually * * * investigatory * * *. The purpose is not to try a case * * *.

“Rule-making proceedings do occur, however, in which an adversary element is present. It may be clear in advance which interests will benefit and which will suffer if proposed regulations are issued. * * * *Under these circumstances it may be desirable to let affected parties treat the rule-making proceedings as adversary*, so that all the information, conclusions, and arguments submitted to the agency may be *publicly* disclosed to opposing interests which may answer, explain, or rebut. * * *

“Hearings of this type may be held * * * because of statutory requirements, as in the case of the Food and Drug Administration * * *.”

Again, at page 56, the Committee Report stated:

“Two characteristic tasks of a prosecutor are those of investigation and advocacy. It is clear that when a controversy reaches the stage of hearing and formal adjudication the persons who did the actual work of investigating and building up the case should play no part in the decision. * * * Of course, this may produce a state of mind incompatible with the objective impartiality which must be brought to bear in the process of deciding. For this same reason, the advocate — the agency’s attorney who upheld a definite position adverse to the private parties at the hearing — cannot be permitted to participate after the hearing in the making of the decision. A man who has **buried himself in one side of an issue** is disabled from bringing to its decision that **dispassionate judgment** which Anglo-American tradition demands of officials who de-

cide questions. Clearly the advocate's view ought to be presented publicly and not privately to those who decide."

It was designed to avoid the three-fold combination of judge, jury, prosecutor, in one man. In the instant case the combination is four-fold, judge, jury, prosecutor, and *prosecuting witness*, all combined in one individual.

The Senate Committee which reported the bill condemned this practice, S. Rep. No. 752, 79th Cong., pp. 3, 17-18, and said:³⁰

*"The gist of the subsection is that no investigating or prosecuting officer shall directly or indirectly in any manner influence or control the operations of hearing and deciding officers, except as a participant in public proceedings, and even then in no different fashion than the private parties or their representatives. * * * The exemption(s) * * * are * * * upon the theory that (they) * * * may be much like rule making. The latter, of course, is not subject to Section 5. * * * There are, however, some instances of either kind of case which tend to be accusatory in form and involve **sharply controverted factual issues**. Agencies should not apply the exceptions to such cases, because they are not to be interpreted as concluding **fair procedure** where it is required."*

Again at p. 30, Senate Report 752 stated:

" * * where cases present **sharply contested issues of fact**, agencies should not as a matter of good practice take advantage of the exemptions'."*

This case involves "sharply controverted factual

³⁰Cf. Administrative Procedure Act, Legislative History, 79th Cong., S. Doc. 248, pp. 185, 203-4, 216.

issues." "Fair procedure" and "good practice" under §5(c) prohibit the witness and counsel from subsequently preparing, *ex parte*, the findings of fact and conclusions.

(b) Under constitutional provisions for judicial due process, investigating or prosecuting officials are prohibited from participating or advising in the decisions in this case.

Assuming, *arguendo*, that §5(c) is not mandatory, the minimal constitutional "rudiments" of fair play require a separation of judge, jury and prosecutor. As stated in a kindred problem, *Mahler v. Eby*, 264 U.S. 32, 44 (1924):

"We put this conclusion not only on the language of the statute but also on general principles of constitutional government."

The rule is so clear that little authority is needed. An early Washington case states it well. In *Maitland v. Zanga*, 14 Wash. 92, 44 P. 117 (1896), the court held, at page 95, that:

" * * if this practice were to be tolerated, that the judge * * * would be compelled to pass upon the weight of his own testimony, * * * considering the inclination of the human mind to attach more importance to its own statements than to those of others, it is easy to see that the rights of the litigants might be prejudiced in such a case."*

Similarly, Jones on Evidence, 2d ed. (1908) §764, states that the practice of a judge testifying in a case before him is improper because he has to

"pass upon the competency and weight of his own testimony."

The same principle extends to an arbitrator. See

Brocklehurst & Potter Co. v. Marsch, 225 Mass. 3, 8; 113 N.E. 646, 649 (1916), in which the court said:

“* * * Arbitration implies the exercise of the judicial function. An arbitrator ought to be free from prejudice and able to maintain a fair attitude of mind toward the subject of controversy. * * * *It is contrary to natural right and fundamental principles of the common law for one to judge his own cause.*”

In *Berkshire Employees Ass'n. v. National Labor Relations Board*, 121 F.2d 235, 238-9 (C.C.A. 3, 1941) the court applied the principle to administrative agencies:

“* * * It is comparable to the situation of a lawyer who has represented a client in an endeavor to get a settlement of a claim and, before the claim is settled, is appointed to the bench and sits in the very case as judge. * * * *We conclude that in this case the facts, if proved, show a case which goes beyond the line of fair dealing with a particular litigant.*”

But even more pointedly in a parallel case involving almost identical facts, the practice was condemned by the Supreme Court in a subsequent phase of the earlier *Morgan* case, cited *supra*. *Morgan v. United States*, 304 U.S. 1, 14-22 (1938). “Rule-making” was also involved in that case fixing rates and practices for the future of certain market agencies, 304 U.S. 1, cf. Adm. Proc. Act, §2(c), *supra*, p. 13. Also in that case, as in this, there had been a court remand and a second hearing (*ibid.*, p. 14); many pages of transcript and of statistical exhibits (p. 16). As in this case appellants submitted briefs

to the Administrator but no briefs were "at any time supplied by the Government" (p. 16); findings were prepared in the bureau whose representatives had conducted the proceedings for the Government (pp. 17-18); the Secretary himself did not read all of the record but conferred with subordinates who had prepared the findings, conclusions and order (pp. 17-18). The court condemned this practice as being a denial of the

"fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature." (p. 19)

It said:

"* * * *If in an equity cause, a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred ex parte with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps.*" (304 U.S. 19-20)

The court answered the "adjudication v. rule-making" contention by stating at page 20:

"*It has regard to the mere form of the proceeding and ignores realities.* * * * The proceeding had all the essential elements of contested litigation, with the Government and its counsel on the one side and the appellants and their counsel on the other. * * *"

and held that as the hearing was fatally defective, the order must be set aside.

The same reasoning is true here. If petitioner had been permitted to continue his cross-examination and to complete his offer of proof, the record would show that Mr. Callaway acted not only as witness and participated in cross-examination of industry witnesses, but that he and Mr. Goodrich further participated as judge or fact finder in the preparation of the findings, conclusions, and orders which were then signed by the Administrator, and Acting Administrator, respectively.

There is no intended reflection on the personal integrity of these able men. But it is necessary to consider "the inclination of the human mind to attach more importance to its own statements than to those of others," *Maitland v. Zanga, supra*, p. 85. Their resultant findings of fact have greatly prejudiced your petitioner in the instant case.³¹

³¹This practice has been condemned by prominent counsel in other Food and Drug matters. See Best, *Practical Aspects of Cereal Food Standardization* (June, 1948), 3 Food Drug Cosmetic Law Quarterly 204, 212. Mr. Best is General Counsel of the Quaker Oats Company, and comments:

"* * * The standard is proposed by Departmental officials, presented by a Departmental attorney, supported by testimony of Departmental officials, and submitted to a Departmental hearing officer who reports his findings and conclusion back to the Departmental officials who proposed it. *The manufacturer would be naive indeed who would not have some misgivings about the effectiveness of this procedure to prevent arbitrary action.*" Also, see Austern, *Formulation of Mandatory Food Standards* (December,

The duty of the Administrator is "akin to that of a judge," *supra*, p. 78, to address himself to the evidence and upon that evidence to conscientiously reach the conclusions which he deems it to justify. It is flouted to its maximum degree when the very witness who testified and counsel who prosecuted may later prepare the findings based on their own testimony and necessarily partisan views.

If that be the law, then judicial review is a mockery and all that is required is for the witness-cross-examiner-opinion writer in his multiple capacity, first, to figure out the type of an order he wants; second, to take to the witness stand and testify that "in his opinion" such an order would meet the broad discretionary standards of the Act; third, sit down and write such an order based on his own testimony; and fourth, submit it to the Administrator for signature.

It must be repeated that broad principles are involved here, and no personalities as such. The dangers of such a rule are well described in Bell, *Let Me Find the Facts* (July 1940), 26 Am. Bar Ass'n Journal 552, quoting Chief Justice Hughes, that:

"An unscrupulous Administrator might be tempted to say, 'Let me find the facts for the

1947), 2 Food Drug Cosmetic Law Quarterly 532, 580. Mr. Austern is General Counsel for the National Canners Association and comments on the resultant tendency in such findings "to *write up* the evidence to support the decision and to *write down or disregard* the evidence the other way. * * * *This may be a form of advocacy, but it is hardly adequate finding as to the facts of record.*"

people of my country and I care little who lays down the general principles'."

Similarly, Circuit Judge Curtis L. Waller (C.C.A. 5) recently declared:

"Give me the right to fix the facts and you may have the right to declare the law." 17 Miss. L.J. 212, 219 (1945)

If the Food and Drug Administration's own employees may prepare proposed standards, testify as experts, and thereafter participate in draft of regulations, then judicial review can avail little.

But judicial review was intended to avail much. The author of the Food, Drug, and Cosmetic Act stated on the floor of the House:

"We give more authority * * * under this bill than any *white man* ought to have *unless with it there is proper restraint* by the courts. That is what we have tried to do here (by provisions for judicial review)." ³²

The orders should be set aside as unlawfully made because investigating and prosecuting officials who participated in the trial as witness and counsel, thereafter in the absence of petitioner prepared the adverse findings of fact, conclusions, and orders which were subsequently signed by respondents without a conscientious consideration of the entire record.

³²83 Cong. Rec. 7776 (1938) Chairman Lea also referred specifically to the *Morgan* cases, *supra*, in indicating the scope of judicial review which the Food, Drug and Cosmetic Act was designed to afford. *ibid.* 9096 (1938).

B. The Findings of Fact and Conclusions of Law in Both Final Orders are Not Supported by Substantial Evidence. (See Specifications Nos. 6 to 50; *supra*, pp. 53 to 68).

§10(e) of the Administrative Procedure Act, *supra*, p. 17, provides in part that in determining whether an order is supported by substantial evidence:

“* * * the court shall review the whole record or such portions thereof as may be cited by any party.”

The entire record has been certified and the Specifications just named have cited detailed portions thereof.

In *Staley Mfg. Co. v. Secretary of Agriculture*, 120 F.2d 258, 260 (C.C.A. 7, 1941) the court said:

“* * * This court examines the evidence, not to make findings for the Secretary but to ascertain whether his findings are properly supported.”

On rehearing, at page 261, the court added:

“In effect petitioner complained that the Administrative fact finder did not consider the evidence in question. *Certainly the right to present evidence is a barren one if the trier of fact fails to consider it.*”

The Specifications allege such a failure to consider competent evidence.

(1) The findings are slanted and distorted in the *ex parte* manner of an advocate rather than the objective judgment of a dispassionate trier of the facts.

Specifications Nos. 6 to 50 have heretofore shown “as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous.”^{32a} Portions of nearly every finding are shown

^{32a}Rules, 9th Circuit Court of Appeals (Jan., 1948), Rule 20(d).

therein to be slanted and distorted in the manner of an advocate presenting *ex parte* conclusions rather than to be the objective findings and conclusions which due process require (Specifications Nos. 6-17, 19-30, 33-37, 39-41, 43-44, 46-50). This is the end result of an order made "without observance of procedure required by law" just considered. When findings and conclusions are prepared by the Administrator's principal witness and by his attorney who has "buried himself in one side of an issue", rather than by one of "dispassionate judgment", this result is inevitable. *Final Report of Attorney General's Committee, supra*, p. 83. Such "findings and conclusions" may be "a form of advocacy but it is hardly adequate *findings* as to the facts of record." Cf. *Austern, supra*, n, 31, p. 88.

To keep this brief within reasonable limits, petitioner will rely on its detailed Specifications heretofore made, and will avoid as far as possible restating, under Argument, facts and reasons already set out as particularly as may be above under Specification of Errors.

- (2) The Presiding Officer improperly admitted uncorroborated hearsay or rumor which was subsequently relied upon in the findings and conclusions, and he improperly excluded pertinent rebuttal affidavits (See specification Nos. 5(f) to (k), *supra*, pp. 51 to 53; No. 11, 57; No. 21, p. 60).**

The Food, Drug, and Cosmetic Act, §701(f)(3), *supra*, pp. 12-13, provides:

"The findings of the Administrator * * *, if supported by *substantial* evidence, shall be conclusive."

In *Edison Co. v. Labor Board*, 305 U.S. 197, 229-30 (1938), the court said:

“* * * Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. * * * *Mere uncorroborated hearsay or rumor does not constitute substantial evidence.*”

Illustrative is Specification No. 5(f). Petitioner objected that he had no opportunity to rebut a hearsay statement purportedly quoting a woman packer employed at a West Coast plant. The objection was overruled (Goding, R. 866). Fortunately, a representative of this West Coast packer was present at the hearing. He subsequently offered in affidavit form Exs. 37 to 44, of which Ex. 42 is the affidavit of this same woman packer, Mrs. Price. These proffered exhibits counteracted the alleged statement. Finding 16 refers to her reported hearsay statement (R. 866) in support of its finding, but omits to refer to the counteracting affidavits (App. B, p. 21).

The Administrator's Rules of Practice (1940), 5 F.R. 2379-80, §2.707(e), permit receipt of verified affidavits, but provide:

“* * * the Secretary will consider the lack of opportunity for cross-examination in determining the weight to be attached to statements made in the form of affidavits.”

If sworn affidavits are subjected to such a test, then, *a fortiori*, unsworn hearsay of third persons, particularly when thereafter directly contradicted by sworn affidavits, become “uncorroborated hearsay or rumor” and do not meet any test of reliability or necessity.

Exs. 37, 38, and 42 were admitted and rebut these hearsay statements in part (See photographs of excessively packed cans, Ex. 38, *Supp. Vol. II*). Exs. 39, 40, 41, 43, and 44 were equally relevant to rebut this hearsay but were improperly excluded (R. 1167-77). An exception was noted. They are set out in *Appendix F, totidem verbis*, and should have been admitted and considered in the findings.

Specifications Nos. 5(g) to (k) *supra*, pp. 51-3, are similar instances of unlawful admission of and reliance on hearsay, while concurrently disregarding probative evidence of petitioner. They are set out above in full detail, *supra*, pp. 52-3.

Specifications Nos. 11 to 13 and 21 relate in part to hearsay "reports" in Exs. 4 to 7, relied upon by the Administrator to sustain the order (App. A, pp. 4 and 9). Exs. 4 and 6 are self-serving interoffice communications, No. 4 soliciting information developed by No. 5, and No. 6 summarizing the Administrator's view of such information and eliciting further information, later, reported in No. 7.

Ex. 5 consists of 14 numbered pages, a one page chart, and 30 additional unnumbered pages. It is not verified or signed. It was offered by Mr. Callaway as purported "reports" of inspectors who were not otherwise identified or available for cross-examination. Mr. Callaway then, in turn, based sworn "opinion" testimony on his view of the contents of these "reports" (R. 30, 43-4).

Page 1 of Ex. 5 is illustrative. It "reports" an *unidentified* "Consumer Interview" by an *absent* field

inspector at an *unidentified* "retail store" shown only by an *unidentified* and *coded* symbol "SL #1", as to a *coded* and *unidentified* sample "FS 40964-H", reporting an *unidentified* and *coded* individual, "Mr. C.". "Mr. C." is alleged to state that he "is not familiar with canned oysters" and that customers "*do not seem to know anything about the product.*" The next report is similar of a *coded* "Mr. R." who is "not familiar with * * * canned oysters" and says "*the only reason the firm stocks grocery items is to suppress public opinion that his store is a 'liquor' store.*" The last item on page 1 is a *coded* "Mr. V." who "isn't interested in this angle, *since his trade is restaurants and night clubs*".

It would be futile to encumber this brief with detailed references to the multitude of like succeeding "reports". What possible probative value can such reports have? And, if so, how could anyone rebut such anonymous statements, or "findings" or "opinions" based thereon?

In *Powhatan Mining Co. v. Ickes*, 118 F.2d 105, 107 (C.C.A. 6, 1941) an order of the Bituminous Coal Division was set aside because names were not "decoded so that the petitioners, for purposes of cross-examination, might know the *identity* of the producers who made the sales *and the other facts* surrounding the transactions."

Ex. 7 has all of the infirmities of Ex. 5, except that the names are given. But it so confuses canned shrimp and canned oysters that it is impossible to tell which is being referred to (See Mr. Callaway's admission of this, *supra*, pp. 33-4).

Such "uncorroborated hearsay" is not "substantial evidence" whether in documentary form (Specifications Nos. 11 and 21) or in oral form (Specifications Nos. 5(f) to (k)).

Congress so provided in enacting the Food, Drug, and Cosmetic Act. In House Report No. 2139, 75th Cong., p. 10, the Committee cited *Ohio Bell Tel. Co. v. Comm.*, 301 U.S. 292 (1937) and stated:

"While common law rules of evidence need not be enforced, nevertheless it is *essential* to such a hearing that all of the evidence on which the administrative official acts be *disclosed at the hearing* and the right to controvert *viva voce* be accorded."

Administrative tribunals are not bound by technical rules of evidence:

"* * * But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. * * *"

Int. Com. Comm. v. Louis. & Nash. R.R.,
227 U.S. 88, 93 (1913).

The orders should be set aside as based upon "mere uncorroborated hearsay or rumor". *Edison Co. v. Labor Board*, *supra*.

(3) Work sheets underlying respondents' principal Ex. 33 show the latter to be honeycombed with error and contrary to respondents' sworn testimony given in purported reliance thereon. (See Specifications Nos. 26, 27, 42, *supra*, pp. 61, 66).

A critical factual issue in this case is the validity of Finding 6 in the First Final Order that:

"* * * there is no significant correlation be-

tween the incidence of (browning) * * * and the (increased) drained weight of oysters * * *."

Browning is a type of discoloration occurring in oysters protruding above the packing medium (App. A, p. 9). It varies from a faint tinge of yellow brown to the brown color of a Philip Morris cigarette package (R. 332). It is the most serious problem and chief source of complaint in the marketing of over-filled cans of oysters. It is comparable to the brown leaves on a head of lettuce. When a housewife sees such a product she automatically rejects it (Bailey, R. 731), because she thinks it has begun to spoil (R. 1143), although this is not correct. It is due to air coming in contact with oysters forced by overpacking above the packing medium (Bailey, R. 731).

Ex. 33 purports to report the Administrator's observation of degrees of such "browning" on 8 groups of 9 cans each, produced by various packers. The observation was made in every instance by Mr. Callaway (R. 931). Mr. Callaway said that he had adopted the same usage in classifying "browning" as Mr. Esveldt and Dr. Clough (R. 918). Sheets 2 and 3 thereof show Willapoint regular commercial 5 ounce pack (F.S. No. 79-142H and 79-145H). It reports 18 cans examined; "browning" is noted in *only one*. On the "authentic" or test pack of June 16, F.S. No. 79-144H, Code No. 194-E, with a drained weight range from 6.58 to 7.18 ounces, he likewise noted "slight browning" on *only one can* out of 9.

But the witness for the industry, Dr. Clough, examined 24 cans (Nos. 49-62, 64-74) from the same Code No. 194-E, packed on the same day by the same

inspector of Food and Drug from the same batch of oysters under identical conditions and having drained weights ranging from 6.40 to 7.49 ounces (Exs. 25, 27), and reported a "trace of browning" on 2 cans, "slight browning" on 6 cans, "medium browning" on 12 cans, and "heavy browning" on 4 cans, or "browning" in varying degrees on *all 24* of the overpacked cans which the Food and Drug inspector packed.

This wide difference in the 24 instances of browning reported by the scientist for the industry, Dr. Clough, on the Willapoint pack and the 1 instance reported by the witness for the Administrator, Mr. Callaway, on the Willapoint pack is entirely explained by the casual and arbitrary way in which Mr. Callaway actually classified browning.

This can be demonstrated by his testimony as to another pack. On direct examination, Mr. Callaway had stated (R. 821):

*"These two samples (18 cans, F.S. 79-141H and 79-118H) represented what, in my opinion, are about as bad a condition of browning as I have seen in some time * * *."*

and that they showed a *"very considerable browning."*

This testimony related to 18 cans packed by Northern Oyster Company under F.S. No. 79-141H (Ex. 33, p. 2). His "remarks" show "slight browning" on 2 cans and "medium browning" on 3 cans, out of 9 cans examined. On F.S. 79-118H, out of 9 cans examined, 5 cans showed "slight browning". The remainder were shown as "o.k." or "no defect noted".

Thus, out of a cut of 18 cans, there were 7 classified as having *"slight browning"* and 3 classified as

having "*medium browning*" and 8 had no notation at all of "browning."

When asked on cross-examination about certain of these cans and notations about them shown on the work sheets, Mr. Callaway stated that he classified these oysters as having only a "slight browning" even though he could see it through what was described as "browner liquid" (R. 945). Asked why he did not use the term "heavy browning", he replied:

"I did not take the oyster out. If I had taken the oysters out and seen if they were heavy, I would have probably reported heavier." (R. 946)

But earlier he had reported on the work sheets the number of broken and twisted oysters in the can (R. 946), and he had previously said that he personally made the observations in each instance (R. 917-8).

Asked how he could make a report on the contents of these cans and know the precise number of oysters that were broken or twisted without taking them out of the can, he replied:

"If that was reported, it certainly was not my report."

Denying that he was changing his testimony, the Presiding Officer interrupted to say:

"I think we are getting unnecessarily involved here." (R. 946-7)

Asked whether a type of browning which was such that you could see it through liquid which is browner than other liquid should nevertheless be classified as slight, he replied:

"Not necessarily." (R. 948)

He then explained that:

“* * * I define slight browning as having two connotations. One: the depth of the color, and the other, the area of the oyster.”

Asked whether that type of explanation goes to every use of the term “slight browning”, he replied:

“I cannot answer that question.” (R. 948)

The findings make no reference to such inconsistencies on cross-examination. In *National Labor Relations Board v. Reeves Rubber Co.*, 153 F.2d 340, 342 (C.C.A. 9, 1946) this court cited with approval its ruling in *NLRB v. Union Pacific Stages*, 99 F.2d 153 (C.C.A. 9, 1938) quoting the following therefrom:

“* * * The Board vaguely sanctioned certain statements of evidence by mingling them with its findings, without noting, as we have pointed out, that this evidence had been *changed* or *modified upon cross-examination*, or shown to be incorrect by other admitted or established facts * * *.”

Respondents' Exhibit 33 is not reliable. It was modified and changed on cross-examination. It is at variance with the work sheets. In the absence of supporting work sheets it should be rejected. Under the circumstances, the orders are void in placing reliance thereon. (See Findings 2, 10, 12, 15, 17, 18; App. B., pp. 17-19; 21-2).

(4) The Presiding Officer erred in refusing to admit relevant work sheets on the ground that they were official files and might be considered by the Administrator, though not received in evidence. (See *Specifications Nos. 5(a) to (e)*, *supra*, pp. 50-1).

Space limitations do not permit setting forth in full all of respondents' contradictory testimony with re-

spect to browning (R. 910-950). It is impossible for this court to appraise the integrity of Ex. 33 in the absence of the "supporting" work sheets which were shown in reality to be at marked variance with Ex. 33.

The petitioner sought repeatedly to have the work sheets placed in evidence in order to demonstrate these inconsistencies. Its requests were repeatedly refused (R. 1000-9).

The Presiding Officer excluded the work sheets on the ground that they were "official files" of the Administrator who could subsequently examine them as such and decide whether or not to place them in the record. This is reversible error.

§701 (e), *supra*, p. 12, requires the Administrator to base his order *only* on substantial evidence:

"of record at the hearing." (*supra*, p. 12)

Nothing can be treated as evidence if not introduced as such. Papers in the Administrator's files are not evidence in a case. *United States v. Abilene & So. Ry. Co.*, 265 U.S. 274, 288 (1924). Facts conceivably known to the Administrator but not put in evidence will not support an order, *Chicago Junction Case*, 264 U.S. 258, 263 (1924); and may not be referred to or relied upon by the Administrator, *Sanders Bros. v. Federal Communications Comm.*, 106 F.2d 321, 326-7 (C.C.A., D.C., 1939); reversed on other grounds, 309 U.S. 470 (1940).

The Presiding Officer had previously insisted that petitioner furnish for the record its work sheets in support of its exhibits (See Specification No. 5(b)). His refusal of a like request of respondents was high-

ly prejudicial to petitioner, both in proceedings before the Administrator, and in resultant judicial review.

In *Powhatan Mining Co. v. Ickes*, *supra*, the court, in reversing an order of the Bituminous Coal Division, under like circumstances, held at p. 10:

" * * a reviewing court cannot know what a full hearing might have shown and for that reason is not free to speculate as to the prejudice involved in such an erroneous ruling."*

Both final orders should be set aside for the unlawful acts of withholding from the records, both before the Administrator and before this court on review, these underlying work sheets "supporting" Ex. 33.

(5) The Second Final Order is unlawful in refusing to receive into evidence certain cans of oysters. (See Specification No. 5(1), *supra*, p. 53-4).

The previous sections indicate the extent of controversy over the "browning" and other impairments resulting from overpacking.

The Presiding Officer stated with respect to the terms "slight browning", "medium browning", and "heavy browning":

"I think the Administrator can take official notice, and any court can take judicial notice that this term which we are now discussing extensively, and I might add, needlessly, has no standard, no standard of specificity." (R. 913)

Mr. Callaway testified that there is no adaptable qualitative way of measuring the grades or degrees of browning (R. 913-15).

Petitioner therefore offered in evidence certain identified cans that had been packed in petitioner's plant by the Administrator's own inspector to yield intentionally an overpacked quantity. He proposed that every *even* or *odd* numbered such can (as the Administrator might elect) be opened and examined at the hearing room, and the remainder made available to this court as "part of the evidence". In view of the Presiding Officer's opinion of "judicial notice" that there is no "standard of specificity" the only way this court could view the tangible results of overpacking to determine whether the Administrator's finding thereon was "supported by substantial evidence", or was "arbitrary and capricious" was to see the evidence. The offer was refused (R. 1018-28, 1103-4).

The refusal of the offer was a denial of fair hearing and deprived this court of reviewing all of the evidence. It is reversible error.

Normally, an appellate court should not be burdened with real evidence or physical exhibits, particularly when an administrative agency is created to make requisite determinations with respect thereto. But this court, by Rule 18, has made especial provision for models, diagrams, and exhibits of material "*forming part of the evidence*" taken below. Other appellate courts have parallel rules. See Rules of the United States Supreme Court, Rule 18.

The record in this case shows that there is no other way whereby a court may ascertain with respect to these immeasurable qualities whether or not the find-

ings with respect thereto are in fact supported by substantial evidence without admitting the identified cans as a "*part of the evidence*" (R. 1026).

It was prejudicial error to reject the offer of proof of these identified cans.

(6) Finding of Fact No. 7 of the First Final Order, as amended by Finding No. 2 of the Second Final Order, is not supported by substantial evidence in finding that "blanched oysters are practically indistinguishable from those prepared from oysters that have been pre-steamed in the shehl" (See Specifications Nos. 33 to 37, *supra*, pp. 62-4).

This finding of fact is directly contrary to Ex. 28 and Appendix B thereof and to Ex. 30. (See App. E of this brief, pp. 41-3, 47-50, 53).

The finding is critical in this case. Petitioner's blanched oysters are the finest product ever marketed and more closely approximate the natural flavor of fresh oysters than any canned oysters in history (Bailey, R. 724). Southern packers also gave undisputed testimony with respect to a similar process which they were forced to abandon in 1942 because of requirements to over-fill their cans beyond the 5 ounce drained weight. This is the maximum quantity that either region of the industry can pack to fill a can of fresh opened oysters (*supra*, p. 36).

The opinion evidence with respect to taste qualities of such fresh opened and blanched oysters includes Mr. Callaway's statement that the two different products are "indistinguishable" (R. 802), as contrasted with his own earlier acknowledgment of superiority

of the fresh opened product (R. 46), and the statements of industry officials of both the Western and Southern oyster industries who testified repeatedly that they were far superior (Bailey, R. 724; Holcombe, R. 554-5; Carriere, R. 453-4).

It is appropriate first to examine the nature of the study which Mr. Callaway made to support his statement that:

“* * * the oysters prepared for canning by the blanching process such as employed by Willapoint Oysters, Inc., were indistinguishable from pre-steamed oysters in odor, taste and appearance * * *. That was our opinion.” (Callaway, R. 800)

He stated that he made an organoleptic examination (R. 809). An organoleptic examination is a test by use of the organs or senses, *i. e.*, taste, odor, and appearance. When properly done it is an accepted method of analyzing food.

The methods which Mr. Callaway used were so widely at variance with standard technique that a statement of the accepted method was set out in petitioner's brief submitted to the Administrator prior to its determination of the case (*Supp. Vol. III, pp. 13-14*). It was ignored. It quoted *McGraw-Hill Series in Food Technology, Flavor*, by E. O. Crocker (1945), Chapter 11, Organoleptic Technique, “Example of Quantitative Organoleptic Work”, p. 98, which summarizes a standard method in part as follows:

“* * * *The tasting was done in an established manner, without swallowing, in $\frac{3}{4}$ oz. sips, after each of which the mouth was rinsed with lukewarm water. All findings were written down se-*

cretly and scored to the nearest whole point; then the score sheets were turned over to a secretary for tabulation and averaging."

This procedure should be contrasted with the casual method employed by Mr. Callaway:

(a) No established procedure was followed in sampling. The various participants in the organoleptic examination "may have skipped around" in examining the different cans (Callaway, R. 893);

(b) No regular sequence was followed. Some smelled one first, others smelled others first. Some examined one first, others examined others first (Callaway, R. 896);

(c) No record of any kind was made as to the organoleptic examinations conducted by the participants as to taste or odor (R. 893). Mr. Callaway used a spoon. He "couldn't say exactly" what the others did (R. 894);

(d) No separate scoring was made of the results of the examination by any of the participants (Callaway, R. 898);

(e) No rinsing of the mouth was done between the sampling of various specimens, although Mr. Callaway testified that:

"* * * (In) any number of cases it is customary to wash the mouth out between tasting, where there is a very strong tasting * * * involved * * *." (R. 894-5)

(f) The only record of any kind is "what appears on the (work) sheets". The work sheets were not offered in evidence and did not make any report on taste or odor (Callaway, R. 893). Ex. 33 makes no

references of any kind to flavor or taste of any canned oysters;

(g) The "opinion" testimony as to taste was all based on recollection (R. 898-9);

(h) But later Mr. Callaway said he "doesn't remember" what one participant's opinion was. He doesn't "recall exactly what" another participant's opinion was, and as to a third, he does not "remember discussing this in detail with" him. He does remember that he discussed it with one other man, and:

"* * * I *just happened to remember* that he and I both thought it was largely affected by the salt content." (R. 907); and

(i) Mr. Callaway admitted that it is possible in an organoleptic examination for one member or participant to influence the judgment of other participants (Callaway, R. 952). The other participants were all subordinate officials who performed this work under Mr. Callaway's direction (R. 891, 1012, 1014).

It is amazing to your petitioner that this agency, having administered a Food and Drug Act since 1906, would presume to support their conclusions on a matter of such vital interest to an industry on such a casual and random study. It is nothing short of utterly arbitrary and capricious, and voids the orders made in reliance thereon.

Although the entire act is to advance the "interest of consumers" (*supra*, p. 11), the *only* consumer evidence was totally ignored. It remains only to consider that evidence.

Ex. 28 reports a Consumer Acceptance Test made

by three competent and impartial women at Mary Cullen's Cottage. The Cottage has complete facilities for preparing, cooking, and serving food. These facilities were used in conducting the Panel. The participating women included the Director of the Cottage, the Assistant Director who had been so employed for 12 years, and is a graduate of Oregon State College, Home Economics Department, with a Food Major, and has had past experience managing restaurants, and the third member was a relatively new employee selected as a typical housewife (App. E, pp. 42-3). It is operated by the Oregon Journal, Portland, Oregon, in conducting its regular women's page feature covering home service activities. Neither petitioner nor any of its associates knew any of these persons nor has ever had any contact with the Oregon Journal (R. 742-3).

Three different brands of oysters were purchased at random in Portland grocery stores. The labels were first removed and the cans were identified to the Panel members only by number. No. 1 was the *steam-opened Western* oysters known as Denco brand. No. 2 was the *blanched Western* oysters known as Willapa point brand. And No. 3 was the *steam-opened Southern* oysters, known as Tropical brand (App. E, pp. 42-3).

These three brands were prepared in two typical dishes, oyster stew and fried oysters, using standard cooking recipes. The Panel members made orderly, independent and separate notations of quality of each brand with respect to appearance, texture and flavor of the oysters, and of the broth flavor of the

oyster stew, and of the appearance, texture and flavor of the fried oysters prepared from each different sample (App. E, pp. 43-4; Callaway, R. 898).

The court's attention is particularly invited to these detailed comments (App. E, pp. 47-8):

The *steam-packed* Western oysters (No. 1), prepared for stew, were variously described by Panel members as "slightly chemical but not unpleasant", "strong and a chemical flavor", and "salty, both broth and oyster strong chemical flavor." The Tropical brand of *Southern* oysters (No. 3), prepared for stew, was described as "strong and metallic, leaves bad after taste", "strong flavor and somewhat stale", and "strong and slight stale taste". But the Willapoint *blanched* pack (No. 2), prepared for stew, was successively described as "very good—with a fairly fresh flavor—has true oyster flavor", "good full flavor but mild", and as "good flavor, mild".

Again, the three brands were prepared by standard recipe as fried oysters. The No. 1 or *steamed* pack Western oysters were described as "slightly chemical flavor that hid much of oyster taste", "definite chemical flavor", and "strong salty taste but good". The Tropical brand of *Southern* oysters (No. 3) were described as "poor flavor except for breeding, would hardly recognize that these were oysters", "lacking in flavor", and "very little oyster flavor". But the Willapoint *blanched* oysters (No. 2) were again described as "good oyster flavor with a fresh taste", "good full mild flavor", and "mild flavor, very good".

The summary for each was that No. 2 (Willapoint) was "better in many respects in both the stew and

fried products", "had best flavor, full yet not strong", and "No. 2 best oyster of three but No. 1 best looking before cooking." (See Ex. 30, App. B, p. 53 *re* nectar).

Although the Administrator had recognized that such evidence would be highly probative and should be offered "in the interest of consumers", and although he had given specific instruction to his Field Agent to have a Consumer Acceptance Test made of the different brands of oysters, he did not offer any such evidence. The inspector stated that he did not have time to accomplish this (R. 1104-5).

But when petitioner offered such probative evidence as to the "interest of consumers", the Administrator completely ignored the testimony.

This raises the question:

Should this court in the exercise of judicial review, set aside an order which is arrived at: "by accepting part of the evidence and totally disregarding other convincing evidence"?

In *National Labor Relations Board v. Union Pacific Stages, supra*, this court answered that question at p. 177:

"* * * But the courts have not construed this language (that findings if supported by evidence shall be conclusive) as compelling the acceptance of findings arrived at *by accepting* part of the evidence *and totally disregarding other* convincing evidence."

The order should be set aside for totally ignoring convincing evidence by competent industry witnesses proving the superiority of quality in petitioner's pack. Cf. *U.S. v. Lord-Mott Co.*, 57 F. Supp. 128 (D.C., Md., 1944).

(7) The First Final Order is unlawful because there is no substantial evidence to support the findings of fact, conclusions and order, that the name of Western oysters when canned is "Pacific Oysters", while concurrently finding that the name of Southern oysters when canned is "Oysters" (*See Specification Nos. 6 and 18, supra, pp. 53 and 58*).

Finding No. 1 (App. A, p. 2), cites 9 references to the record. R. 33-35 is based on the hearsay Exhibit No. 5, discussed *supra*, p. 94, and states that the Western species "*might be called*" *gigas* and is "*usually*" known as the Pacific Oyster; and that the *ostrea virginica* species is "*often known*" as Cove Oysters; and it distinguishes between "Eastern Oysters" and "Pacific Oysters" with no reference to the name of either when canned. R. 156-8 states that the *ostrea virginica* crosses with a variety of that species and is "*called the Cove Oyster*" which is found in the Gulf. It identifies the *ostrea gigas* type simply by its Latin name. R. 161 differentiates between the Pacific Coast oyster and the Eastern oyster. R. 178-9 again use the same terms. R. 523 refers to the Pacific Coast oyster industry in a geographic sense rather than in a sense restrictive to labeling. No pertinent testimony appears on R. 524-5, or on R. 535. R. 536 is cross-examination by counsel for the Administrator and refers to "Southern Oysters", "Atlantic Oysters" and other geographical names. R. 537 makes no reference.

On the other hand, the finding omits to state that throughout the record the *ostrea virginica* oyster when canned is identified by Mr. Callaway as the "Southern" or "Cove" oyster at least 14 times (R. 19, 20, 35, 37, 38, 52, 61-2, 63-4, 67, 88, 479, 485, 486,

487). It omits to refer to the one label which Mr. Warren, counsel for the Administrator, requested be read into the record during the entire hearing. The label read:

“TILLAMOOK BRAND FANCY SELECT
OYSTERS

CONTENTS 5-OUNCES OYSTER MEAT”,

distributed by Haines Oyster Company, Pier 67, Seattle 1, Washington (R. 634). It omits to refer to the apparent familiarity of counsel for the Administrator with the fact that the “common or usual name” of both species of oysters when canned to be labeled as “Oysters.” Mr. Warren asked, at page 179:

“At the present time, are not a considerable portion of Pacific Coast canned oysters simply designated as *Oysters*?”

At the second hearing Mr. Goodrich, counsel for the Administrator, offered only *one* label, Ex. 31, which is petitioner's label. He brought out that this label has been continuously used for the past 16 years. Over all the years, petitioner's canned product has been so labeled as “OYSTERS” and not as “Pacific Oysters”.

The truth of the matter is that for “shorthand” purposes of identification, the *ostrea virginica* species of canned oysters is variously termed as Southern, Cove, Atlantic, Eastern, Gulf, and other local names. And, by the same token, the *ostrea gigas* type is for the same purpose variously termed Western, Pacific Coast, West Coast, Pacific, Willapa, Tillamook, and other similar shorthand identifying names.

But basically “oysters is oysters” when canned, just

as "pigs is pigs". It is submitted that the only 2 labels of record and the long-continued practice of the industry to term the Western product "OYSTERS" when canned, speak louder than unsupported "opinion" as to "the common or usual name so far as practicable."

(8) Both Final Orders are unlawful in relieving Southern packers of their burden of proof and in imposing upon Western packers an improper burden of proof. (See Specification of Errors No. 5(m), *supra*, p. 54).

The Administrative Procedure Act §7(c) (*supra*, p. 15), provides in part:

" * * * the *proponent* of a rule or order shall have the burden of proof."

The 1944 order (App. C, pp. 28-9) had found:

"It is entirely practicable under existing canner practices for canneries on the Atlantic Coast and Gulf Coast to pack oysters * * * "

to a drained weight of 7½ ounces, and that:

"Such a fill can be met in commercial practice without unreasonable difficulty and without damage to the product."

Since 1942, southern producers voluntarily packed such a 7½ ounce fill (*supra*, p. 22). Prior to the 1947 hearings, the Southern oyster industry made application to the Administrator to call a hearing on its "proposal to amend the fill * * * so as to lower the required drained weights," stating that the quality of their pack "is injured by the fill now required" (Ex. 6, *supra*, p. 29).

The Southern industry thus was the "proponent of a rule" to reduce the fill. Under §7(c) they had the

burden of proof on their "proposals * * * to lower the required drained weight." Nevertheless, in the 1947 hearing, the Administrator himself assumed the burden of proof for the Southern oyster industry by first producing his own witnesses (R. 12-13 to 150) and by making voluntarily a proposal to reduce the drained weight on Southern oysters from standards theretofore found reasonable.

The House report on the Administrative Procedure Act, H. R. Rep. No. 1980, 79th Cong., p. 36, in commenting on §7(c) said:

"That the proponent of a rule or order has the burden of proof means *not only that the party initiating the proceeding* has the general burden of coming forward with a *prima facie* case *but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain.* * * * "

Almost identical language is contained in Senate Report No. 752, at page 22.

Although the Southern industry had a continuing burden of proof as proponent of a rule to lower its drained weight, it did not offer any supporting statistical evidence or any experimental packs to sustain the burden that should have rested upon them as to proposals to *lower* the drained weight (*supra*, pp. 35-6, 44).

Concurrently, the Administrator proposed *increased* fill requirements for Western oysters (Callaway, R. 37-8). The Western industry met the burden thus shifted to them, both by scientific testimony and by detailed statistical evidence of experimental packs of

Western oysters showing rapid deterioration of quality when subjected to increased drained weights (R. 150-447b, 564-627; Exs. 14-20; *supra*, pp. 34-5).

Subsequently, in the second hearing, respondents, having refused petitioner's application for further hearing on blanched Western oysters (*Orig. Vol. I, items 1 and 2*) until directed to do so by this court's order of June 8, 1948, again unlawfully imposed a new burden of proof on petitioner, construing it to be "proponent of a rule" (*supra*, pp. 37-8). Petitioner reserved this question, but again assumed the burden and proceeded with detailed oral proof and supporting scientific data and exhibits (*supra*, pp. 39-43).

But such burden was unlawfully imposed on petitioner because it was the Administrator and not petitioner who was "proponent of the rule" to *increase* drained weights for large oysters above the long established 5 ounce standard.

In *Van Camp Sea Food Co. v. United States*, 82 F.2d 365, 373 (C.C.A. 3, 1936), the court said:

"As we have said, the burden of proving its case by more than a mere preponderance of testimony rested on the government, and this burden, in our opinion, it did not meet; and this not only from a consideration of what was shown by the government's proof, but also by what it might have shown but which it did not. * * * "

Thus, in the first hearing the Southern oyster industry was granted an unlawful *preference*, and in the second hearing the Western industry was subjected to an unlawful *prejudice* in that the Administrator twice improperly shifted the burden of proof,

first by voluntarily relieving the Southern oyster industry of its burden of proof as to its own proposal to lower standards of fill theretofore found reasonable for small Southern oysters, and second by imposing on petitioner a burden which was the Administrator's to justify his proposal to increase long continued standards of fill for Western oysters.

Both final orders are unlawful in shifting the burden of proof and should be set aside for those reasons.

C. Both Final Orders Are Unlawful in Being in Excess of Statutory Jurisdiction. (See Specification Nos. 51 to 54, *supra*, pp. 69 to 70).

§401 of the Act, *supra*, p. 11, authorizes the Administrator to promulgate a *reasonable* standard of identity for any food "under its common or usual name so far as practicable." The Administrator in Finding 1 (App. A, p. 2), found that:

"Oysters of the species *ostrea gigas*, commonly known as 'Pacific Oysters,' are canned * * * ."

This finding is defective in not containing the requisite "quasi-jurisdictional" findings in the language of the statute. It makes no sufficient finding of the "common or usual name *so far as practicable*" as to require that petitioner's long established practice be abandoned. Such a finding "is essential to the existence of authority to promulgate the rule." *United States v. B. & O. R. Co.*, 293 U.S. 454, 463-4 (1935); *Mahler v. Eby*, 264 U.S. 32, 44 (1924); *United States v. Chicago, Milwaukee, etc.*, 294 U.S. 499, 510 (1935).

The orders are void because they prescribe an *un*"reasonable" standard of identity that is *not* supported by the evidence.

§401 further authorizes the Administrator to promulgate *reasonable* standards of fill. It is submitted that in the light of the foregoing criticisms of the evidence, it must necessarily follow that the statutory mandate of a "reasonable standard of fill" has not been satisfied and that the orders must be set aside as being in excess of statutory jurisdiction.

D. Both Final Orders Are Void as Being an Abuse of Discretion and Arbitrary and Capricious. (See Specification Nos. 4(a) to (e), 55 to 57, pp. 48 to 50, 70 to 72).

These allegations relate to the rejection of evidence, to the refusal to grant motions for further hearing, to the manifestations of bias, and to the studied design by which the Administrative agency has given credence to the testimony of its own side of the evidence and has ignored substantially all of the evidence of petitioner and other Western packers of oysters.

Bias, not in any invidious personal sense, but in the legal sense of prejudging the case, was first apparent when the Administrator denied Mr. Mitchell's request on behalf of petitioner for a further hearing (*Orig. Vol. I, Item 6*). Mr. Mitchell's brief, filed in February 1948 before the First Final Order became effective, set forth in substantial detail the reasons why the order should be reviewed (*Orig. Vol. I, Item 7*, pp. 1-27, dated February 5, 1948). Respondent Ewing, in his reply of March 10, 1948, stated:

"I have given careful consideration to your requests * * * ."

"In support of your application for another hearing you offer to present new evidence * * * ."

The substance of this offer is that many canners now are packing Pacific oysters without pre-steaming, using only a short blanching; that with such blanched oysters it is necessary to use a put-in weight of $9\frac{3}{4}$ ounces * * * ; and that the use of such a put-in weight would impair the quality of the canned oysters.

“Even if such evidence were in the record, I am convinced that the fill proposed in the tentative order should be adopted * * * .”

Respondent Ewing then reasoned that since test packs showed that raw oysters could be packed to a $9\frac{3}{4}$ ounce fill, the same should be true of blanched oysters. He disregards the facts of browning, distortion, and disfiguration, and all of the arguments advanced by Mr. Mitchell.

It was again demonstrated in the urgency with which the Administrator denied petitioner's petition for a further hearing with respect to its new blanching process or, in the alternative, for a temporary stay to permit of judicial review (*Orig. Vol. I, item 1*). He stated:

“This order already has been long delayed to the detriment of the public and canners in other areas to permit representatives of Pacific canners every opportunity to present data that is relevant and material to a reasonable order. I do not believe that any reason exists for further delay.”

In *Continental Box Co. v. National Labor Relations Board*, 113 F.2d 93, 95-6 (C.C.A. 5, 1940), the court, although sustaining the Board on the facts there presented, effectively quoted this passage from literature:

“In the colloquy over the forthcoming trial of Rebecca, Sir Walter Scott makes the parties to it say—‘I ordered the hall for his judgment seat.’ ‘What,’ said Bois Guilbert, ‘so soon?’ ‘Aye’ replied the Preceptor, ‘the trial moves rapidly on when the judge has determined the sentence beforehand’.”

By thus prejudging the matter he, of necessity, placed himself and his subordinates in a position where “face saving,” if nothing else, effectively dictated that after this court had remanded the proceeding and after evidence had been taken, they should arrive again at the same result. This result they accomplished in their findings “with studied design” by giving “credence to the testimony” of the Administrator’s witnesses on direct examination, and by ignoring much of their testimony on cross-examination and “the evidence given by” petitioner.

A recent parallel case is *Pittsburg S.S. Co. v. National Labor Relations Board*, 167 F.2d 126, 128-9 (C.C.A. 6, 1948). The court said:

“ * * * *it is contrary to human experience that all witnesses on one side of a case are falsifiers while those on the other side are all truthful*
 * * * . * * * *‘If an administrative agency ignores all the evidence given by one side in a controversy, and with studied design gives credence to the testimony of the other side, the findings would be arbitrary and not in accord with the legal requirement’.*”

The orders should be set aside as being an abuse of discretion and arbitrary and capricious.

E. Both Final Orders Are Unlawful as Being Contrary to Constitutional right. (See Specification Nos. 58 and 59, *supra*, pp. 71 and 72).

The contentions that the orders are a taking of property without due process of law rest upon the foregoing showings as to (a) an arbitrary lack of procedural due process, and (b) capricious requirements made without being supported by substantial evidence that petitioner (1) package oysters in such an excessive quantity as to destroy its established customer acceptance, and (2) relinquish its long-continued usage of the term "oysters," which term would be conferred by the orders exclusively upon the Southern producers with whom the Administrator has found your petitioner to be in competition.

See *Morgan v. Nolan*, 3 F. Supp. 143 (S.D. Ind., 1933), *aff'd Nolan v. Morgan*, 69 F.2d 471 (C.C.A. 7, 1934); *N.L.R.B. v. Phelps*, 136 F.2d 562, 563, Note 1 (C.C.A. 5, 1943).

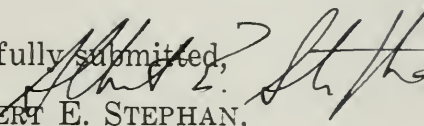
CONCLUSION

Petitioner has shown that the First and Second Final Orders are not in accordance with law and void because they are: (a) made without observance of the procedure required by law; (b) unsupported by substantial evidence; (c) in excess of statutory jurisdiction; (d) arbitrary, capricious, and an abuse of discretion; and finally, (e) contrary to constitutional right.

It is respectfully submitted that petitioner's prayer should be granted for an order permanently setting aside and annulling and perpetually enjoining the

First Final Order of the Administrator, and the Second Final Order of the Acting Administrator, dated, respectively, March 10, 1948, and August 3, 1948, entitled "Docket No. FDC-50, *In the Matter of Establishing Definitions and Standards of Identity and Amending the Standard of Fill of Container for Canned Oysters.*"

Respectfully submitted,


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Dated at Seattle, Washington, October ²³25, 1948.

APPENDICES "A" to "F"

APPENDIX A

[Published in Federal Register, March 13, 1948, 13 F.R. 1337-1339]

TITLE 21 — FOOD AND DRUGS

Chapter I—Food and Drug Administration, Federal Security Agency

(Docket No. FDC-50)

PART 36—SHELLFISH; STANDARDS OF IDENTITY AND FILL OF CONTAINER.

CANNED OYSTERS

In the matter of establishing definitions and standards of identity and amending the standard of fill of container for canned oysters.

Final order. By virtue of the authority vested in the Federal Security Administrator by the provisions of the Federal Food, Drug, and Cosmetic Act (secs. 401, 701; 52 Stat. 1046, 1055; 21 U.S.C., 341, 371), and on the basis of the evidence received at the above-entitled hearing duly held pursuant to notice issued on June 6, 1947 (12 F.R. 3726); upon consideration of the exceptions filed to the tentative order issued by the Federal Security Administrator on October 4, 1947 (12 F.R. 6699) and granting those relating to identity and denying those relating to fill of container, as may be seen by comparison of this order with the tentative order, the following order is hereby promulgated.

DEFINITIONS AND STANDARDS OF IDENTITY

*Findings of fact.*¹ 1. Oysters are canned commercially in the United States on the Atlantic, Gulf, and Pacific coasts. The oysters on the Atlantic and Gulf coasts are of the species *Ostrea virginica*. (They are often referred to as "Eastern Oysters.") The common name of oysters of this species, when canned, is "oysters" or "Cove Oysters." Two species, *Ostrea gigas* and *Ostrea lurida*, are grown on the Pacific Coast. Oysters of the latter species, known as "Olympia Oysters," are not now commercially canned, but this is due to economic reasons, and oysters of this species are suitable for canning. Oysters of the species *Ostrea gigas*, commonly known as "Pacific Oysters," are canned in considerable quantities. (R. 33, 35, 95, 156-158, 161, 178-179, 523-525, 535, 536-537)

2. Pacific oysters are much larger, are somewhat more tender, and easier to break or tear, than Eastern oysters. The methods used for canning Eastern oysters and Pacific oysters are essentially the same. The basic procedure is described in finding 3. (R. 8, 31, 52, 95, 158, 162, 174, 523-524, 526)

3. Oysters in the shell are steamed until the shell opens. The partially cooked oysters are removed from the shells, washed to remove extraneous matter, such as sand, pieces of shell, etc., and packed into containers. Water is added to fill the container, leaving only a small head space. Such water is known as a

¹The citations following each finding of fact refer to the pages of the transcript of the testimony and the exhibits received in evidence at the hearing, which are the basis for these findings.

“packing medium.” Salt may be added for seasoning. The containers are sealed and processed by heat to prevent spoilage. (R. 31-32, 48-49, 97-101, 109-111, 116-117, 134, 517-519)

4. Eastern oysters are commonly canned whole. Sometimes the large sizes of Pacific oysters are cut into two or more pieces before canning and sometimes pieces resulting from breaking and tearing oysters are segregated and canned together. Some oysters are broken and torn in removing them from the shells and some in washing and in packing into containers. During processing and subsequent handling of the canned product small pieces of the outer surface of the oysters often break off. When oysters are canned as they come from the shuckers, without cutting, they are commonly designated by the name “Oysters.” When pieces of oysters resulting from the tearing and breaking of oysters are segregated and canned they are commonly designated by the name “Pieces of Oysters.” When oysters are cut into two or more pieces they are commonly designated by the name “Cut Oysters.” The designations “sliced” and “diced” have sometimes been used but are not appropriate, since the oyster does not lend itself to cutting into slices or cubes, and if so cut the slices and cubes lose their shape in processing and subsequent handling. (R. 34-35, 41, 49-52, 69-71, 88-89, 110, 185, 269-270, 288, 417-419, 459-470, 477-486)

5. Canned Eastern oysters and canned Pacific oysters are sold in the same trade channels. Generally speaking, consumers distinguish between them on the

basis of the difference in size. The canned Eastern oysters being smaller are generally used for oyster stews. The Pacific oysters being larger may be used for frying or for stews. (R. 17-21, 67, 75, 95, 158, 417-418, 445-446, 519, 524, 526, 532, 534-537, 624; Ex. 4, 5, 6, 7)

6. Canned oysters consist of cooked oysters in a watery liquid. The proportion of oysters to liquid depends largely on the quantity of oysters placed in the container before the packing medium is added. The watery liquid surrounding the oysters contains salt and soluble material extracted from the oysters. It has an oyster taste and is useful in making oyster stews, but is usually discarded if oysters are used for frying, although it may be used for food in some other way. This liquid is less valuable than the oysters. (R. 31-32, 42, 52(a), 76, 167-170, 447-447(a), 454, 513, 525-526, 535-536, 624, 625)

7. Occasionally oysters for canning are not steamed prior to removal from the shell. Such raw oysters, after washing, are packed directly into the container with or without packing medium, and the container sealed and processed. Even if no packing medium is added to the raw oysters, a watery liquid separates from them during processing. Raw oysters may be blanched and packed into containers with the liquid in which they are blanched as a packing medium, or with additional water and salt. Sometimes the liquid draining from cleaned shell oysters during the pre-steaming is collected and used, with or without added water and salt, as a packing medium. (R. 31-32,

39-42, 45, 49, 52-54, 55-57, 76, 78, 123-125, 134, 165-166, 168-169, 180-181, 453-454, 457, 513, 519, 523-524, 532, 553, 555).

8. The flavor of canned oysters is influenced by the canning procedure used, but the final canned product in all cases is a mixture of cooked oysters and watery liquid. The processes described in finding 7 are suitable unless the product contains too much liquid and too little oysters. The quantity of oysters in a container, however, is more properly related to the fill of container than to identity. (R. 31-32, 42, 45-46, 76, 524, 532, 553, 555)

Conclusion. Based on the foregoing findings of fact it is concluded that it will promote honesty and fair dealing in the interest of consumers to adopt a definition and standard of identity for canned oysters as follows:

§36.5 *Canned oysters; identity; label statement of optional ingredients.* (a) Canned oysters is the food prepared from one or any mixture of two or all of the forms of oysters specified in paragraph (b) of this section, and a packing medium of water, or the watery liquid draining from oysters before or during processing, or a mixture of such liquid and water. The food may be seasoned with salt. It is sealed in containers and so processed by heat as to prevent spoilage.

(b) The forms of oysters referred to in paragraph (a) of this section are prepared from oysters which have been removed from their shells and washed and which may be steamed while in the shell or steamed

or blanched or both after removal therefrom, and are as follows:

(1) Whole oysters with such broken pieces of oysters as normally occur in removing oysters from their shells, washing, and packing.

(2) Pieces of oysters obtained by segregating pieces of oysters broken in shucking, washing, or packing whole oysters.

(3) Cut oysters obtained by cutting whole oysters.

(c) (1) When the form of oysters specified in paragraph (b) (1) is used, the name of the food is "Oysters" or "Cove Oysters," if of the species *Ostrea virginica*; "Pacific Oysters," if of the species *Ostrea gigas*; "Olympia Oysters," if of the species *Ostrea lurida*.

(2) When the form of oysters specified in paragraph (b) (2) is used, the name of the food is "Pieces of ———," the blank being filled in with the name "Oysters" or "Cove Oysters," if of the species *Ostrea virginica*; "Pacific Oysters," if of the species *Ostrea gigas*; "Olympia Oysters," if of the species *Ostrea lurida*.

(3) When the form of oysters specified in paragraph (b) (3) is used, the name of the food is "Cut ———," the blank being filled in with the name "Oysters" or "Cove Oysters," if of the species *Ostrea virginica*; "Pacific Oysters," if of the species *Ostrea gigas*; "Olympia Oysters," if of the species *Ostrea lurida*.

(4) In case a mixture of two or all such forms of

oysters is used, the name is a combination of the names specified in this paragraph of the forms of oysters used, arranged in order of their predominance by weight.

STANDARD OF FILL OF CONTAINER

*Findings of fact.*² 1. Conservation Order M-81 of the War Production Board, effective in 1942, required, among other things, that canned oysters be packed in cans of certain sizes, the smallest of which was the No. 1 picnic can, 2-11/16 inches in diameter and 4 inches high. It also required that the No. 1 picnic can of oysters be filled to yield a cut-out weight of not less than 7½ ounces. These requirements with respect to canned oysters remained in effect until 1946. (R. 67, 94, 204, 443, 448, 544, 550)

2. The standard of fill of container for canned oysters issued under authority of the Federal Food, Drug, and Cosmetic Act, effective February 23, 1945 (9 F.R. 14008), requires a drained weight of oysters of not less than 68 per cent of the water capacity of the container (7½ ounces for the No. 1 picnic can), where the average drained weight per oyster is less than ½ ounce. There is no requirement in such standard for drained weight in case the canned oysters are of larger size. (R. 16, 36-38, 65-66, 94; Ex. 3)

3. Canned oysters packed on the Atlantic and Gulf coasts are generally of such size as to be subject to

²The citations following each finding of fact refer to the pages of the transcript of the testimony and the exhibits received in evidence at the hearing, which are the basis for these findings.

the requirements of the standard of fill of container. Since the latter part of 1942 they have been so packed as to yield a drained weight of $7\frac{1}{2}$ ounces for the No. 1 picnic can, with drained weights for other cans in proportion. The increased fill made necessary by Conservation Order M-81 and by the standard of fill of container under the Federal Food, Drug, and Cosmetic Act, caused some minor manufacturing difficulties and some changes in the character of the canned oysters. The food contained much less liquid; sometimes the oysters tended to stick together in the can; possibly they were slightly softer. (R. 17, 30, 44, 94-97, 126, 131-133, 139, 204, 451-453, 457-458, 459, 461-463, 466-467, 480, 481, 485-486, 493-494, 513, 519, 546-547, 551-552, 556, 562, Ex. 3)

4. Pacific oysters were not canned in any significant quantity while the requirements of Conservation Order M-81 with respect to canned oysters were effective, but canning was resumed in 1946. Most of the canned Pacific oysters, on account of their large size, are not subject to the requirements of the existing standard of fill of container for canned oysters, and when canning was resumed they were generally packed to yield the cut-out weight in use prior to 1942. The cans so packed were not well filled with oysters. (R. 17, 63-64, 78-81, 125-126, 150, 161, 177, 178, 192, 204, 265, 390-391, 418, 431-432, 443, 621, 634-635; Ex. 3, 8)

5. Soon there appeared on sale in the same market areas, canned Pacific oysters in No. 1 picnic cans with cut-out weights of slightly over 5 ounces of oys-

ters, and from the Atlantic and Gulf coasts canned oysters in the same size cans with cut-out weights of $7\frac{1}{2}$ ounces of oysters. The canned Pacific oysters were often labeled to show the total weight of oysters and liquid in the can but not the drained weight of oysters. The difference in the amounts of oysters present was known to wholesale dealers, but was not generally known to retail dealers or to the final purchasers. This is a condition likely to confuse and deceive consumers. (R. 17-21, 62, 64, 67, 93-94, 125-126, 133, 158, 444-446, 633, 634; Ex. 4, 5, 6, 7, 21)

6. There has been no commercial canning of Pacific oysters where cans were filled to capacity with oysters, and it is impossible on the basis of commercial experience to determine the maximum fill of such oysters which can be used without impairment of quality. Experimental packs sponsored by canners of Pacific oysters were said by representatives of the canners to show impairment of quality at any point over the fill in use prior to 1942. Conditions of canned oysters described as "browning," "pressure," and "deformities" were selected as the factors of quality for judging these packs, and a certain number of "demerits" were assigned to each condition. The assignment of "demerits" was made on an arbitrary basis and was not shown to be reasonably related to trade or consumer concepts of quality.

"Browning" is a type of discoloration occurring in oysters protruding above the packing medium. It is related to the amount of entrapped air in the can at the time of closure. Excessive entrapped air can be

avoided in good manufacturing practice. This type of discoloration is not as noticeable as other discolorations commonly found on canned Pacific oysters, particularly yellow spots known as "liver spots," and black areas on the mantle of the oysters.

"Pressure," as the term was used is evidenced by a flat area on an oyster where it has been pressed tightly against the lid of the can. This flattened area is not unsightly and does not affect the cooking quality of the oyster.

"Deformities" as a quality factor are of the following four types: "Twisting" refers to distortion of the shape of the oyster. It results from an oyster occupying a twisted position in the can. A "broken" oyster is an oyster from which a substantial segment has been completely severed, each portion being in the can. A "torn" oyster is one from which such a segment is partly, but not completely, separated. "Pieces" of oysters are oyster segments.

Except in the case of the condition called "pressure," there is no significant correlation between the incidence of these conditions and the drained weight of oysters, when the per cent of oysters showing defects is considered instead of the sum of "demerits" per can. It appears possible that there may be some correlation between the number of "twisted" oysters and increasing drained weight, but in the results reported it is not statistically significant.

Analysis of the data submitted by representatives of the canners of Pacific oysters on the experimental packs prepared by them shows that such oysters can

be packed to yield a cut-out weight of at least $6\frac{1}{2}$ ounces in the No. 1 can without significant impairment of the quality of such oysters. (R. 44, 193, 204, 214-219, 238-251, 252-253, 267, 271-278, 279-409, 526-529, 538, 566-602, 620, 625, 653-700; Ex. 14 (A), (B), (C), (D); 15 (A), (B), (C); 16 (A), (B), (C), (D), (E); 17, 18, 19, 20, 21)

7. Presteamng or blanching, or any other heat treatment of raw oysters, causes them to lose water so that with heat-treated oysters a lesser put-in weight than with raw oysters is necessary to obtain a drained weight of $6\frac{1}{2}$ ounces. Put-in weights of as high as 11 ounces of raw Pacific oysters can be packed into the No. 1 eastern oyster can, which after processing yield drained weights of $6\frac{1}{2}$ ounces or more, without impairment of quality due to the fill. (R. 38, 39, 56, 125, 126, 163, 164; Ex. 12)

8. Experimental packs of Pacific oysters made by the Food and Drug Administration showed that it is possible to can Pacific oysters so as to comply with the standard of fill of container now applicable to canned oysters of an average drained weight of less than $\frac{1}{2}$ ounce, without substantial increase in the incidence of "pressure," "deformities," and discoloration, including "browning," and without other substantial change in quality from that of the commercially canned Pacific oysters having a much lower drained weight. (R. 37-38, 67, 93, 107, 114-115, 120, 121, 125-126, 630, 631, 638, 639, 640, 642, 653-700; Ex. 9 (A), (B), (C); 10 (A), (B), (C); 11 (A) to (Q), inclusive; 12)

Conclusions. It would not promote honesty and fair dealing in the interest of consumers to so reduce the requirements of the present standard of fill of container for canned oysters as to return to the fill in use prior to 1942.

It would not promote honesty and fair dealing in the interest of consumers to make separate standards of fill of container for canned oysters of different sizes or for oysters of different species.

On the basis of the evidence of record and the foregoing findings of fact it is concluded that, by using any of the heat treatments given raw oysters before packing into the can, a 6½-ounce drained weight from the No. 1 can can be obtained without impairment of the quality of canned Pacific oysters.

On the basis of the evidence of record and the foregoing findings of fact and conclusions, and taking into account the differences between commercial canning and experimental canning, it is concluded that a standard of fill of container that will promote honesty and fair dealing in the interest of consumers is a standard based on drained weight of oysters, applicable to oysters of all sizes and species in cans of various sizes, requiring that the drained weight of oysters be not less than 59 per cent of the water capacity of the can.

Wherefore, it is ordered, That paragraphs (a) and (b) of §36.6 be deleted and that there be substituted therefor a new paragraph (a) as follows:

36.6 *Canned oysters; fill of container; label statement of substandard fill:* (a) The standard of fill of

container for canned oysters is a fill such that the drained weight of oysters taken from each container is not less than 59 per cent of the water capacity of the container.[†]

Paragraphs (c), (d), and (e) of §36.6 are hereby designated as paragraphs (b), (c), and (d), respectively.*

Effective date. The regulations and amendments hereby promulgated shall become effective on the ninetyeth day following the publication of this order in the FEDERAL REGISTER.

(Secs. 401, 701, 52 Stat. 1046, 1055; 21 U.S.C. 341, 371)

Dated: March 10, 1948.

OSCAR R. EWING, *Administrator*.

(F.R. Doc. 48-2227; Filed, Mar. 12, 1948: 8:49 a.m.)

[†]The arithmetic of translating percentage figures of drained weight into the 6½ ounce fill or other fills can be roughly computed by assuming for approximate purposes the standard size can to have 11 ounces. Thus, applying percentage figure of 68% to 11 ounces, equals 7.48 ounces; 64% of 11 ounces, equals 7.04 ounces; 59% of 11 ounces, equals 6.49 ounces; 46% of 11 ounces, equals 5.06 ounces.

*The prior text of §36.6 which is herein amended by this order is set out in Appendix C, *infra*, pp. 31-3.

APPENDIX B

[Published in Federal Register, August 12, 1948, 13 F.R. 4663-4664]

TITLE 21 — FOOD AND DRUGS

Chapter I—Food and Drug Administration, Federal Security Agency

[DOCKET No. FDC - 50]

PART 36—SHELLFISH; DEFINITIONS AND STANDARDS OF IDENTITY; QUALITY AND FILL OF CONTAINER CANNED OYSTERS

In the matter of establishing definitions and standards of identity and amending the standard of fill of container for canned oysters.

Final order; supplemental findings of fact, conclusions, and order. By virtue of the authority vested in the Federal Security Administrator by the provisions of the Federal Food, Drug, and Cosmetic Act (secs. 401, 701; 52 Stat. 1046, 1055; 21 U.S.C. 341, 371), and on the basis of evidence received at a public hearing held at the direction of the United States Circuit Court of Appeals for the Ninth Circuit beginning on July 7, 1948, the following findings of fact, conclusions, and order are made:

DEFINITIONS AND STANDARDS OF IDENTITY

Findings of fact. 1. Finding 6¹ is modified so that the second sentence shall read: The proportion of oysters to liquid in the finished food depends on the

¹This refers to a finding in the order promulgating a definition and standard of identity for canned oysters and amending the standard of fill of container therefor, published in 13 F.R. 1337.

quantity of oysters placed in the container before packing medium is added and on the extent to which such oysters have been precooked by pre-steaming in the shell or blanching after removal from the shell (R. 728, 977).

2. Finding 7 is modified by adding the following at the end thereof:

At the commencement of the 1947-1948 canning season, Willapoint Oysters, Inc., and other canners of Pacific oysters, began the commercial practice of preparing oysters for canning without pre-steaming in the shell.² Oysters were purchased as raw shucked oysters or were shucked at the canneries. They were, after washing, immersed in a hot brine solution, the salt content of which ranged from approximately 3 to 10 per cent, and blanched in the hot brine for a period from 30 to 60 seconds. After removal from the brine solution, the oysters were washed in fresh water, cooled, and held in warm water until they were ready to be placed in the cans. The cans, after filling with a put-in weight of approximately 7½ oz. of blanched oysters, a salt tablet and water, were sealed and processed by heat, using the regular cannery procedure. When this blanching method of preparation is em-

²The method used by Willapoint Oysters, Inc., was worked out by Mr. R. H. Bailey, president of the firm, in the kitchen of his home using a pressure cooker and a hand closing machine. He furnished no data as to the maximum fill obtainable, and despite one year's experience with the method, no attempts, experimental or commercial, have been made to increase the fill beyond 5 ounces drained weight. (R. 713, 751, 767-770, 776, 1037-1038)

ployed, or when modified methods are used, the treatment of oysters in the boiling brine solution causes the raw oysters to lose water and soluble solids into the brine solution. This loss approximates 16% by weight from the raw oysters. Such loss is not significantly different from the loss which occurs when Pacific oysters are subjected to a light pre-steaming in the shell. After processing in the can, the canned oysters prepared from blanched oysters are practically indistinguishable from those prepared from oysters that have been pre-steamed in the shell, although blanched oysters have a slightly different flavor and the liquid drained from canned oysters that have been prepared for canning by blanching has more fine particles of oyster material in suspension than does similar liquid drained from cans prepared after pre-steaming the oysters in the shell. (R. 713-716, 773, 800, 803, 811-815, 820-826, 829, 844-845, 847-848, 875, 902-906, 1144-1147, Ex. 33)

STANDARD OF FILL OF CONTAINER

Findings of fact. The following findings of fact are made in addition to those forming part of the order previously promulgated (13 F.R. 1337):

9. Pacific oysters prepared for canning by the blanching method are no better than canned Pacific oysters prepared for canning by pre-steaming in the shell. A substantial segment of persons in the industry and large scale purchasers regard them as inferior because of the material suspended in the liquid and because the oysters are more tender and break more readily. Willapoint Oysters, Inc., the principal pro-

ducer of canned oysters prepared for canning by the blanching method has not differentiated canned oysters prepared from blanched oysters from canned oysters prepared from pre-steamed oysters either by labeling, advertising, or merchandising representations. No changes in labeling have been made by any canners using the blanching method in order to inform purchasers of canned oysters of the method used in preparing their oysters for canning. The same labeling is used for pre-steamed and for blanched oysters. (R. 757, 760, 800, 803, 824, 847-848, 878-882, 1057, Ex. 23, 24, 31)

10. In order to attain a given drained weight of canned oysters, the changes which take place in the oysters during the preparation for and in the canning process must be taken into account. The most significant change is the loss of liquid and the cooking of the oyster meats when oysters are subjected to heat treatment. The total quantity of liquid which separates, based on the weight of raw oysters, is approximately the same whether the oysters are packed into the can raw, given partial cooking in boiling salt water prior to placement in the can (as occurs in the blanching process), or partly cooked in the shell by steaming. (R. 38, 55, 163, 826, 877, 1129 1143-1144 Ex. 11(g), 11(e), Ex. 33)

11. When raw oysters are used to fill the can and no water is added as a packing medium, all of the liquid draining from the oysters because of heat treatment is retained in the can and forms the packing medium. This results in the maximum retention of

oyster flavor, but the liquid in the can after processing is quite murky, and this is objectionable to many purchasers. To attain a drained weight of approximately 7 ounces from the No. 1 EO can, it is necessary to put in approximately 11 ounces of raw Pacific oysters. (R. 32, 41, 124, 722-723, 784, 848, 1046)

12. During the blanching process such as described in modified finding 7 under Identity, the raw oysters are partly cooked and lose some liquids. The loss in weight is approximately 16%.³ As a result of this loss of liquid during blanching, there is less loss in the can during processing than with raw oysters. To attain a drained weight of 7 ounces from the No. 1 EO can, a lesser put-in weight is required than for raw oysters, *i.e.*, about 9½ ounces are necessary with the degree of cooking during the blanching process employed by Willapoint Oysters, Inc. To attain a drained weight of 5 ounces using similarly blanched oysters a put-in weight of only 7½ ounces is necessary. This quantity of blanched oysters does not fill the can. Water is added to the blanched oysters in the can to serve as part of the packing medium; it fills space in the can not filled with oysters. The lower put-in weight permits a canner to replace 2 ounces of blanched oysters with 2 ounces of water. (R. 825-826, 830, 854, 859-866, 869-871, 875, Ex. 33)

13. When the practice of pre-steaming oysters in the shell is used, it is customary to steam them suf-

³By variations of salinity of brine, temperature and time of heating, the loss of liquid may be as great as, or even greater than, with pre-steaming. (R. 768, 771, 826, 877, 907, 1042, 1062, 1129, 1143)

ficiently to cause the shells to open. This is an economical method of opening oysters prior to removal from their shells. When this practice is employed there usually is a slightly greater loss of liquid than occurs in blanching. As a result there is slightly less liquid lost in the can during heat processing than with blanched oysters. Using Pacific oysters that have been pre-steamed enough to cause the shells to open, a put-in weight of about 9 ounces in the No. 1 EO can is needed to give a drained weight of approximately 7 ounces. Canned oysters prepared from pre-steamed oysters have less of the original oyster flavor than when raw oysters are used, and slightly less oyster flavor than when blanched oysters are used. The difference is more pronounced as between the liquids. It is a common practice for canners of oysters on the Gulf and Atlantic coasts to pre-steam somewhat more than do canners of Pacific oysters. With heavily pre-steamed oysters, the meats are cooked more in the shells and are subject to less loss of liquids in the can, in fact, in many instances a put-in weight of around 7½ ounces will yield a drained weight of approximately 7 ounces. Water is added as a packing medium. (R. 718, 824, 829, 847, 978, 1039, 1054, 1062)

14. The put-in weight of oysters, because of variable losses which occur in the can during processing, is not an accurate measure of fill of container for canned oysters. It would be a reasonably accurate measure if all oysters were pre-cooked to the same degree before weighing into the cans. (R. 178, 877, 977, 979, 1062, 1143-1144)

15. The liquid draining from oysters as a result of heating has food value and flavor. But it is of much less value to the consumer than is the meat of the oyster. The liquid drained from canned oysters, except where oysters without any blanching or pre-steaming are used, comes largely from the water added by the canner as packing medium. The smaller the put-in weight of oysters, the more water is added by the canner to form a packing medium. (R. 781, 827, 831, Ex. 28, 33)

16. Canned oysters which yield from the No. 1 can a drained weight of 5 ounces are slack-filled.⁴ As the drained weight of oysters is increased above 5 ounces, up to 7 ounces, only minor difficulties are encountered by the canner. No new equipment is necessary; no change in canning procedure is required. It is only necessary for the employees filling the empty cans to place more oysters in those cans as they start down the packing line. It may be necessary to use more care to prevent salt tablets from bouncing out of the cans. Sometimes a portion of the top oyster is clipped off by the sealing operation. This frequently occurs with a fill designed to yield 5 ounces drained weight but the relative incidence of clipping between a fill designed to yield 5 ounces and one devised to yield 6½ ounces is not shown by the record. (R. 775, 779, 786, 803, 806, 808, 823, 832, 848, 854, 861, 866, 869, 871, 875, 908, 1113, 1115, 1117-1124, Ex. 32)

17. The factors of quality in canned oysters that are most important to consumers are not disclosed by the record. The appearance factors discussed in the record

⁴This is very graphically shown by Exhibit 32.

and referred to as twisted and broken oysters, browning, and pressure are factors which were emphasized by a committee appointed by Pacific oyster canners to show why they should not be required to increase the fill of container that has been used by them. Except for pressure, the other conditions—twisted and broken oysters and browning—occur regularly in cans filled to yield 5 ounces drained weight. With slack-filled cans, the condition called pressure naturally is not encountered. Based on the number of oysters showing these defects, there is no real difference between canned oysters filled to yield 5 ounces of drained weight and those filled to yield 6½ ounces drained weight whether oysters were pre-steamed or blanched. On a can basis, the can with more oysters tends to have more damaged oysters than a can with fewer oysters, since the percentage of oysters damaged in the canning procedure is about the same without respect to fill. (R. 204, 214-218, 785, 786, 881, 912, 918, 983-985, Ex. 19, 33)

18. Except for slight differences in flavor and appearance, the food value of the liquid packing medium taken from canned oysters is approximately the same in cans having the same drained weight of oysters, regardless of method of preparing the oysters for canning. As drained weight increases, the quantity of liquid packing medium decreases. This decrease is due to less water being added to fill empty spaces in the can before sealing. The flavor and food value of the liquid packing medium, however, is inversely proportional to the amount of water added as a packing medium. (R. 823, 830, Ex. 33)

Conclusions. The following additional conclusions

are made on the basis of the evidence of record and the foregoing findings:

There is no basis for making separate standards of fill of container for canned oysters based upon the method of preparing oysters for canning.

It will not promote honesty and fair dealing in the interest of consumers to base the fill of container requirement for canned oysters on the amount of oyster meat put into the can before processing, or on the method used in preparing oysters for canning.

It will promote honesty and fair dealing in the interest of consumers to base the fill of container requirements on the drained weight of oysters and to require the same drained weight whether the oysters used were packed into the can raw or were blanched or were pre-steamed in the shell before placement in cans.

A reasonable requirement for canned oysters packed with the blanching process which will promote honesty and fair dealing in the interest of consumers is that the drained weight of oysters be not less than 59% of the water capacity of the can.

It is ordered, That no change be made in the definition and standard of identity for canned oysters or in the standard of fill of container established by my final order of March 10, 1948.

(Secs. 401, 701, 52 Stat. 1046, 1055; 21 U.S.C. 341, 371.)

Dated: August 3, 1948.

J. DONALD KINGSLEY,
Acting Administrator.

[F.R. Doc. 48-7279; Filed, Aug. 11, 1948; 8:52 a.m.]

APPENDIX C

[Published in Federal Register, November 25, 1944; 9 F.R. 14008-9]

TITLE 21 — FOOD AND DRUGS**Chapter I—Food and Drug Administration****Federal Security Agency**

[DOCKET No. FDC - 42]

**PART 36—SHELLFISH: DEFINITIONS AND STANDARDS
OF IDENTITY; QUALITY; AND FILL OF CONTAINER
STANDARDS OF FILL OF CONTAINER FOR CANNED
OYSTERS**

By virtue of the authority vested in the Federal Security Administrator by provisions of the Federal Food, Drug, and Cosmetic Act (52 Stat. 1046, 1047, and 1055, 21 U.S.C. secs. 341, 343(h)(2) and 371), the Reorganization Act of 1939 (53 Stat. 561 ff., 5 U. S.C. sec. 133-133v), and Reorganization Plans No. I (53 Stat. 1423) and No. IV (54 Stat. 1234); and upon the basis of evidence of record at the hearing duly held pursuant to notice issued on July 20, 1944 (9 F.R. 8192), and no objection having been filed to the proposed order published on October 20, 1944 (9 F.R. 12657-9), the following order is hereby promulgated:

FINDINGS OF FACT

1. On May 27, 1912, the Secretary of Agriculture, to facilitate the enforcement of the Food and Drugs Act of 1906, issued an announcement known as Food Inspection Decision 144 with regard to fill of containers for canned foods. This announcement was general in terms and pertinent provisions stated in substance that in canned food products the can serves not only as a container but also as an index to the quantity of food therein; that the can should be as full of food as

practicable for packing and processing without injuring the quality or appearance of contents; and that when food is packed with water, brine, etc., the can should be as full of the food as practicable and should contain only sufficient liquid to fill the interstices and cover the product.

2. On February 19, 1914, after extended investigation the Bureau of Chemistry of the Department of Agriculture, which had charge of the administration of the Food and Drugs Act of 1906, issued a Service and Regulatory Announcement designated S.R.A., Chemistry 1. This announcement contained among other provisions the following:

3. *Weights of Oyster Meat Required in Cans of various sizes.*—This notice is issued to inform the trade that pending further investigation the weights agreed upon by the canners at their meeting in Washington, in October 1912, will be regarded by the board as satisfactorily fulfilling the requirements of Food Inspection Decision No. 144. It is expected, however, that the "cut-out" weight of all cans shall conform with this agreement, and where a variation occurs it shall be as often above as below the agreed weight. The weights which have been agreed upon are given below.

—SIZE OF CAN—		<i>Weight of drained</i>	
<i>Diameter</i>	<i>Height</i>	<i>oysters "cut-out"</i>	
<i>Inches</i>	<i>Inches</i>	<i>Ounces</i>	
2 11/16	2 3/4	3	
2 11/16	3 6/16	4	
*2 11/16	*4	*5	
3 3/8	3 15/16	8	
3 3/8	4 9/16	10	

*No. 1 so-called Standard (or Picnic, or E.O., or Campbell's Soup size) can.¹ See *supra*, Brief P.

3. The drained weights prescribed by this announcement are from 42% to 49% of the estimated water capacity of the respective cans.

4. Cans of oysters filled to the minima prescribed by the announcement are only about two-thirds full of oysters. When so filled, the cans contain a smaller quantity of oysters than consumers expect from the size of the container. This percentage of fill is much below that found in other canned foods generally.

5. Prior to 1928 all oyster canneries in this country were located along the Atlantic Coast and the Gulf Coast. In 1928 oyster canning was begun on the Pacific Coast. At present oyster canneries are situated principally on the South Atlantic and Gulf Coasts and the Northwest Pacific Coast.

6. The oysters canned on the Atlantic Coast and Gulf Coast are for practical purposes the same type but those canned on the Pacific Coast are of different species, and are considerably larger in size.

7. After the shell oysters are delivered to the cannery it is the practice of some canneries to wash them. The procedure in all canneries thereafter is essentially the same. The oysters are placed in baskets or cars and then in a retort or steam box and steamed (or pre-cooked, as it is sometimes called). After steaming they are shucked, washed, and drained, sometimes graded, and filled into the cans by hand. Each can is filled with a predetermined weight of oysters, brine or water and a salt tablet are added, and the cans are sealed by machine and then processed by heat to prevent spoilage of the product.

8. The steaming causes the shells to open and thus permit easy shucking, at the same time the oyster meat loses liquid and shrinks in both size and weight.

Until the maximum shrinkage is reached, increased time or temperature of steaming increases the shrinkage. The time and temperature of steaming varies in different canneries and at different times in the same cannery, depending on a number of factors such as the amount of shrinkage the canner desires and the difference of composition of the oysters.

9. In general, Pacific Coast canneries do not steam to the same extent as Atlantic and Gulf canneries. In Atlantic and Gulf packed oysters there is usually a slight gain in weight during processing in the can, whereas in Pacific packed oysters a considerable part of the total shrinkage takes place in the processing with a consequent loss of weight.

10. Considerable experimental work has been done in recent years by the Food and Drug Administration on Atlantic Coast and Gulf Coast canned oysters for the purpose of establishing a fill of container standard. Very little experimental work has been done by the Administration on Pacific Coast canned oysters, the principal reason being that none have been packed there since 1942.

11. It is entirely practicable under existing cannery practices for canneries on the Atlantic Coast and Gulf Coast to pack oysters so that the drained weight of oysters taken from each can will be at least 68% of the water capacity of the container. Such a fill can be met in commercial practice without unreasonable

difficulty and without damage to the product. When so packed, the cans are reasonably full of oysters and such a fill would protect consumers from slack filling of the containers.

12. Pacific Coast canners have not packed oysters commercially since 1942. They have in the past packed oysters in only two different size cans, to wit, the No. 1 can, so-called, the dimensions of which are 2-11/16 inches in diameter and 4 inches in height and which has a water capacity of 10.9 ounces avoirdupois; the No. 1 tall salmon can, so-called, the dimensions of which are 3-1/16 inches in diameter and 4-11/16 inches in height and which has a water capacity of 16.6 ounces avoirdupois. It has been the practice of Pacific Coast oyster canners to pack the No. 1 can to give a drained weight of 5 ounces and to pack the No. 1 tall salmon can to give a drained weight of 8 ounces. There are usually from 4 to 8 oysters in the No. 1 can, the maximum number being 10, to give the 5-ounce drained weight. There are usually from 7 to 13 oysters in the No. 1 tall salmon can, the maximum number being 15, to give the drained weight of 8 ounces. The average drained weight per oyster of Pacific Coast canned oysters is at least 1/2 ounce and is usually more.

13. Atlantic Coast and Gulf Coast canned oysters vary in size, their drained weight averaging from about 4 oysters per ounce to about 13 oysters per ounce.

14. Standards of fill of container for canned oysters in terms of percentage of water capacity of containers are generally more satisfactory than in terms of

ounces per can of each size, because they would encompass any size of can, including sizes not often used.

15. A satisfactory and accurate method of determining the drained weight of canned oysters is as follows:

Keep the unopened canned oyster container at a temperature of not less than 68° or more than 95° Fahrenheit for at least 12 hours immediately preceding the determination. After opening, tilt the container so as to distribute its contents evenly over the meshes of a circular sieve which has been previously weighed. The diameter of the sieve is 8 inches if the quantity of the contents of the container is less than 3 pounds, and 12 inches if such quantity is 3 pounds or more. The bottom of the sieve is woven-wire cloth which complies with the specification for such cloth set forth under "2380 Micron (No. 8)" in Table I of "Standard Specifications for Sieves," published March 1, 1940, in L.C. 584 of the U. S. Department of Commerce, National Bureau of Standards. Without shifting the material on the sieve, so incline the sieve as to facilitate drainage. Two minutes from the time drainage begins, weigh the sieve and the drained oysters. The weight so found, less the weight of the sieve, shall be considered to be the drained weight of the oysters.

16. A satisfactory and accurate method for determining water capacity of containers is set forth in §10.1(a) of Title 21, Code of Federal Regulations, Cumulative Supplement.

17. When canned oysters fall below the standard of fill of container, a label statement which is satisfac-

tory and which fairly and accurately informs the consumer of that fact is the general statement of substandard fill specified in §10.2(b) of Title 21, Code of Federal Regulations, Cumulative Supplement, followed by the statement: "A can of this size should contain — oz. of oysters. This can contains only — oz.," the blank spaces being filled in with the applicable figures.

CONCLUSIONS

1. There is insufficient evidence in this record to warrant the findings of fact on which to base a standard of fill of container when drained weight of oysters in a particular can averages $\frac{1}{2}$ ounce or more per oyster.

2. Promulgation of the regulation hereinafter prescribed, fixing and establishing a standard of fill of container for canned oysters, will promote honesty and fair dealing in the interest of consumers.

Wherefore, the following regulation is hereby promulgated:

§36.6 *Canned oysters; fill of container; label statement of substandard fill.* (a) The standard of fill of container for canned oysters when the drained weight of the oysters in the can after processing averages less than $\frac{1}{2}$ avoirdupois ounce per oyster is a fill such that the drained weight of oysters taken from each container is not less than 68 per cent of the water capacity of the container.

(b) For the purposes of this section canned oysters means oysters packed into containers which are then sealed and processed by heat to prevent spoilage.

(c) Water capacity of containers is determined by the general method provided in §10.1(a) of this chapter (21 CFR, Cum. Supp., 10.1).

(d) Drained weight is determined by the following method:

Keep the unopened canned oyster container at a temperature of not less than 68° or more than 95° Fahrenheit for at least 12 hours immediately preceding the determination. After opening, tilt the container so as to distribute its contents evenly over the meshes of a circular sieve which has been previously weighed. The diameter of the sieve is 8 inches if the quantity of the contents of the container is less than 3 pounds, and 12 inches if such quantity is 3 pounds or more. The bottom of the sieve is woven-wire cloth which complies with the specifications for such cloth set forth under "2380 Micron (No. 8)," in Table I of "Standard Specifications for Sieves," published March 1, 1940, in L.C. 584 of the U. S. Department of Commerce, National Bureau of Standards. Without shifting the material on the sieve, so incline the sieve as to facilitate drainage. Two minutes from the time drainage begins, weigh the sieve and the drained oysters. The weight so found, less the weight of the sieve, shall be considered to be the drained weight of the oysters.

(e) If canned oysters fall below the standard of fill of container prescribed in paragraph (a) of this section, the label shall bear the general statement of substandard fill specified in §10.2(b) of this chapter (21 CFR, Cum. Supp.), in the manner and form therein specified, followed by the statement, "A can of this

size should contain — oz. of oysters. This can contains only — oz.," the blanks being filled in with the applicable figures.

(52 Stat. 1046, 1047, and 1055, 21 U.S.C., secs. 341, 343 (h) (2) and 371; the Reorganization Act of 1939, 53 Stat. 561 ff., 5 U.S.C., sec. 133-133v; and Reorganization Plans No. I, 53 Stat. 1423, and No. IV, 54 Stat. 1234.)

The regulation hereby promulgated shall become effective on the ninetieth day following the date of publication of this order in the FEDERAL REGISTER.

Dated: November 18, 1944.

(Seal) PAUL V. MCNUTT, *Administrator*.

[F.R. Doc. 44-17945; Filed, Nov. 24, 1944; 11:39 a.m.]

APPENDIX D
FOOD INSPECTION DECISIONS¹

**By the United States Department of Agriculture,
Bureau of Chemistry²**

Board of Food and Drug Inspection; approved by
Secretary of Agriculture,³
Issued May 22, 1912³

"No. 144. Canned Foods: use of water, brine, syrup, sauce, and similar substances in the preparation thereof.—The can in canned food products serves not only as a container but also as an index of the quantity of food therein. It should be as full of food as is practicable for packing and processing without injuring the quality or appearance of the contents. Some food products may be canned without the addition of any other substances whatsoever—for example, tomatoes. The addition of water in such instances is deemed adulteration. Other foods may require the addition of water, brine, sugar, or syrup, either to combine with the food for its proper preparation or for the purpose of sterilization—for instance, peas. In this case the can should be packed as full as practicable with the peas and should contain only sufficient liquor to fill the interstices and cover the product.

"Canned foods, therefore, will be deemed to be adulterated if they are found to contain water, brine, syrup, sauce, or similar substances in excess of the amount necessary for their proper preparation and sterilization.

¹Compiled in *Dunn's Food and Drug Laws* (3 Vol.) First Edition, 1927-8, published by United States Corporation Company, page 139.

²*Dunn, supra*, n. 1, Vol. 1, page 139.

³*Dunn, supra*, n. 1, Vol. 1, page 201.

"It has come to the notice of the Department that pulp prepared from trimmings, cores, and other waste material is sometimes added to canned tomatoes. It is the opinion of the Board that pulp is not a normal ingredient of canned tomatoes, and such addition is therefore adulteration. It is the further opinion of the board that the addition of tomato juice in excess of the amount present in the tomatoes used is adulteration—that is, if in the canning of a lot of tomatoes more juice be added than is present in that lot, the same will be considered an adulteration."

**REGULATORY ANNOUNCEMENTS BY UNITED
STATES DEPARTMENT OF AGRICULTURE,
BUREAU OF CHEMISTRY**

Opinions of General Interest Regarding Questions
Arising under the Food and Drug Act, etc.⁴
Issued February 19, 1914.⁴

No. 2. "Weights of clam meat required in cans of various sizes.—Food Inspection Decision No. 144 states that in canned food products the can serves not only as a container but also as an index of the quantity of food therein. It should be as full of food as is practicable for packing and processing without injuring the quality or appearance of the contents, and such products as require the addition of brine, water, etc., for proper preparation should contain only sufficient liquid to fill the interstices and cover the product.

"The board has received many inquiries from canners of clams regarding the weight of clams which cans should contain in order to comply with the *requirements* of the above decision. The subject has, therefore, been investigated by the Bureau of Chem-

⁴*Dunn, supra*, n. 1, Vol. 1, page 21:

istry. As a result of this investigation it is the opinion of the Board that cans which contain the weights of drained clam meat shown below will satisfactorily fulfill the requirements of Food Inspection Decision No. 144. These weights are 'cut-out' weights; i.e., the weights of meat left in the can after all free liquor has been drained off.

Type of Can	Diameter <i>Inches</i>	Height <i>Inches</i>	Cut-Out Weight of Clams <i>Ounces</i>
No. 1 regular or oyster	2 11/16	4	5
No. 1 Maine style	3	4 7/16	8
No. 2 short or picnic	3 3/8	4	8 1/2
No. 2 regular	3 3/8	4 9/16	10

"When cans of other sizes are used they should contain proportional weights of meat.

"It should be remembered that a loss of weight almost invariably occurs when clams are processed, and due allowance should be made for this loss in weighing the clams into the can. It is believed that the experience of the packers is such that there will be no difficulty in making the proper allowance for shrinkage in processing, thus avoiding shortage from this cause. It may be said that the investigations made in the Bureau indicate that the loss in weight in processing varies from about 5 to 15 per cent, the average loss being about 10 per cent of the weight of clams placed in the cans. The weights of drained clam meat should not fall below those given above, or, if a variation occurs, it should be as often above as below the weights specified. (Note: See Nos. 88, 134 and 379, post.)"⁵

⁵*Dunn, supra*, n. 1, Vol. 1, page 21.

No. 3. "*Weights of oyster meat required in cans of various sizes.*—This notice is issued to inform the trade that pending further investigation the weights agreed upon by the canners at their meeting in Washington, in October, 1912, will be regarded by the board as satisfactorily fulfilling the requirements of Food Inspection Decision No. 144. It is expected, however, that the 'cut-out' weight of all cans shall conform with this agreement, and where a variation occurs it shall be as often above as below the agreed weight. The weights which have been agreed upon are given below.

Size of can		Weight of drained oysters 'cut-out' Ounces
Diameter <i>Inches</i>	Height <i>Inches</i>	
2 11/16	2 3/4	3
2 11/16	3 6/16	4
*2 11/16	4	5
3 3/8	3 15/16	8
†3 3/8	4 9/16	10

*Known as No. 1 can †Known as No. 2 can
(Note: See Nos. 88, 134 and 379, post.)"⁶

Issued October 21, 1914⁷

No. 88. "*Quantity of the contents of canned oysters, canned clams, and canned shrimp to be declared on cut-out weights of the drained meat.*—In the opinion of this Bureau, the quantity of the contents of a package of canned (cove) oysters or canned clams, as usually packed and processed, should be declared on the basis of the cut-out weight of the drained meat. This also applies to canned shrimp.

"In this connection attention is called to letters

⁶*Dunn, supra*, n. 1, Vol. 1, pages 21-2.

⁷*Dunn, supra*, n. 1, Vol. 1, page 39.

Nos. 2 and 3, in Bureau of Chemistry Service and Regulatory Announcements for January 1914 (*sic* apparently should have been February 19, 1914, see *supra* No. 2 and 3), which state the weights of drained meat which, in the opinion of the bureau, satisfactorily fulfill the requirements of Food Inspection Decision No. 144 in the case of canned oysters and clams. (Note: This opinion has been modified; see No. 379, post.)”⁸

Issued August 18, 1915.⁹

No. 134. “*Method of determining ‘cut-out’ weights of canned oysters and clams.*—Inquiry has been made regarding the duration of the time of draining to which canned oysters and canned clams should be subjected before determining the ‘cut-out’ weight as specified in letters 2 and 3 of S.R.A., Chem. 1.

“The procedure adopted by the Bureau for draining in order to determine the ‘cut-out’ or drained weight is as follows:

“Make a circular cut almost around the top of the can, push the cut top back into its original position, invert, and allow the contents to drain through the circular opening for one minute. Pour the liquid through a collander and return to the can any weighable particles of solids which have been carried away by the liquid. The openings in the collander should

⁸*Dunn, supra*, n. 1, Vol. 1, page 40.

⁹*Dunn, supra*, n. 1, Vol. 1, page 46.

not exceed 3/16 inch in diameter. (Note: See No. 297, post.)”¹⁰

Issued February 14, 1923¹¹

No. 379. “*Declaration of net weight on canned clams and canned oysters.*—Because the liquid packing medium in canned clams and canned oysters has a certain food value and is ordinarily utilized as food, no objection will be made to marking the net weight of these products in terms of total weight, liquid included. When such markings are made declaration of drained or cut-out weight will not be required, but in all cases these weights should equal or exceed those specified in opinions 2 and 3, pages 1 and 2, Service and Regulatory Announcements, Chemistry 1.

“Opinion 88, page 688, Service and Regulatory Announcements, Chemistry 9, is modified accordingly.”¹²

¹⁰*Dunn, supra*, n. 1, Vol. 1, page 48. Opinion No. 297 referred to in note was issued October 9, 1918 and relates solely to canned shrimp and is not pertinent herein.

¹¹*Dunn, supra*, n. 1, Vol. 1, page 103.

¹²*Dunn, supra*, n. 1, Vol. 1, page 104.

APPENDIX E**(Exhibit 28—FDC 50)****Affidavit of David B. Charlton**

DAVID B. CHARLTON, being first duly sworn, deposes and says:

My name is David B. Charlton. I am owner of Charlton Laboratories of Portland, Oregon. I am a graduate of the University of British Columbia with a major in Chemistry; Master's Degree from Cornell University, major in Bacteriology and minor in Chemistry; Ph. D. from Iowa State College, major in Bacteriology and minor in Chemistry. My experience consists briefly of the following: The years 1926-1928, Assistant Bacteriologist, City of Portland, Bureau of Health; 1929-1931, Instructor in Bacteriology, Oregon State College; 1934 to date, owner and director Charlton Laboratories.

Charlton Laboratories is an analytical and consulting chemical laboratory, including physical testing and food and sanitary bacteriology.

On June 11, 1948, I was requested to make a study comparing at least three different packs of oysters: (1) the Willapoint oyster, blanching process, (2) the presteaming pack in the Pacific Northwest by any other packer who utilized that method rather than the blanching process, and (3) any of the Southern packs of Cove Oysters. I was requested to make laboratory tests duplicating the commercial blanching and steaming pre-cook operations to determine their effect upon the volume of the oyster.

There is attached hereto as *Appendix A*, the laboratory certificate of Charlton Laboratories, Laboratory No. 20369-B, which shows the results of certain volume studies on raw oysters as affected by blanching and steaming pre-cooking processes of the *ostrea gigas* type of oyster. It is largely self-explanatory. It shows that in the blanching process the oyster shrinks in volume an average of 2.76%, whereas in a steaming process the oyster shrinks in volume 16.66%.

I was further requested to make a Consumer Acceptance Test, by means of a so-called Food Panel, of representative brands of canned oysters as they would be used in the home for food. There is attached hereto as *Appendix B* the results of such a Food Panel which are largely self-explanatory.

I purchased on the open market at Hasson's Grocery, Portland, Oregon, cans of Willapoint brand oysters, Code Mark 115L, which I had been advised were of the *ostrea gigas* type and were processed by the blanching method. I also purchased on the open market at Save-Rite Grocery, Portland, Oregon, cans of Denco brand oysters, Code Mark 72S, which I had been advised were of the *ostrea gigas* type and were processed by the pre-steaming method. I also purchased at this grocery cans of the Tropical brand Cove Oysters of the *ostrea virginica* type packed in Louisiana and distributed by Tropical Food Company.

I requested Mrs. Cathrine C. Laughton, Director of Mary Cullen's Cottage, Oregon Journal, Portland, Oregon, to make a Consumer Acceptance Test and to

form a Food Panel consisting of herself and any two other qualified persons whom she might designate. Mrs. Laughton has been for many years the Director of this Cottage. This is the name used by the Oregon Journal in its regular women's page feature covering home service activities, including cooking. The Cottage has separate quarters with complete facilities for preparing, cooking and serving food. These facilities were used in conducting the Food Panel. She selected as one other member of the Panel the Assistant Director of Mary Cullen's Cottage, Mrs. Florence Kirkwood. Mrs. Kirkwood has been so employed for the past twelve years, and is a graduate of Oregon State College, Home Economics Department, with a Foods major, and has had past experience managing restaurants. The third member of the Panel was Mrs. Crystal Mathews, a relatively new employee of the Oregon Journal, but selected because she was a typical housewife.

The Food Panel test was as follows: I first removed the labels and all identifying marks from the cans, and then delivered them to Mrs. Laughton, identifying them only by number, and giving to the number 1 figure the Denco brand, to the number 2 figure the Willapoint brand, and to the number 3 figure the Tropical brand. The identity of the different brands was at no time known to Mrs. Laughton, Mrs. Kirkwood or Mrs. Mathews.

Mrs. Laughton conducted the test in my presence. The cans were opened by Mrs. Laughton in the presence of the other two members of the Food Panel and

myself, and prepared for serving in two typical dishes: oyster stew and fried oysters.

In preparation of the oyster stew the recipe used was standard, but seasoning and butter were omitted. Two cups of milk were brought to the scalding point, one cup of canned oysters with the liquid content of the can were added. The mixture was brought to a scalding point and served. In preparation of the fried oysters, the canned oysters were drained, dipped in commercial cracker meal (cracker meal made especially for breading), then dipped in one egg beaten with two tablespoons milk, then in cracker meal. Oysters fried in $\frac{1}{4}$ inch of melted margarine and shortening.

Each member of the Panel was requested to make an independent separate notation with respect to the appearance, texture and flavor of the oysters, and of the broth flavor of the stewed oysters, and of the appearance, texture and flavor of the fried oysters.

The detailed appraisals are set forth in *Appendix B*. They show some criticisms and some favorable points for each of the three brands, and show that the Willapoint oyster (number 2 in the test) was selected as the best by each of the three members of the Panel.

DAVID B. CHARLTON.

[Verification]

Laboratory Certificate

CHARLTON LABORATORIES
Portland 7, Oregon

Sub. Appendix "A"

Laboratory No. 20369-B

To: Willapoint Oysters, Inc.
423 Bell Street Terminal
Seattle 1, Washington

Subject: Oyster Studies

Date: June 30, 1948

**Volume Studies on Raw Oysters and as Affected By
Blanching and Steaming Pre-Cooking Processes**

Volume in Cubic Centimeters

Sample Number	Raw	After Blanching	Percent Loss in Volume
1	81	78	3.7
2	102	100	2.0
3	77	75	2.6
<hr/>			
Total	260	253	8.3
Average	87	84	2.76

Sample Number	Raw	After Steaming	Percent Loss in Volume
4	91	77	14.3
5	86	69	19.7
6	93	78	16.1
<hr/>			
Total	270	224	50.1
Average	90	74	16.7

Comments:

1. Each sample number consisted of two (2) oysters shucked at the Laboratory.

2. Fresh raw oysters were purchased unshucked and in the shell on the open market at Lighthouse Oyster Company, Portland, Oregon. These oysters had

been delivered to this company from oyster beds in Willapa Bay for opening and retail sale as fresh oysters.

3. The blanching process consisted of duplicating in the laboratory the method used by Willapoint Oysters, Inc., specifically, dipping the shucked oysters in a boiling 5 per cent salt brine solution for 45 seconds, and on removal placing in cold water agitated with compressed air for a period of 6 minutes.

4. The steaming process consisted of duplicating in the laboratory the method commonly utilized in presteaming oysters in the shell by the Pacific Coast packers. Specifically, fresh shucked oysters were immediately placed in what is technically known as a Petri dish. This is a small flat glass container with a lid which fits closely down over the sides. It thus resembles the close fit of the shell around an unshucked oyster, thus preventing any direct washing action by the flowing steam. It was necessary to use this method rather than that of an oyster in the shell so that the volume of the oyster before and after steaming could be obtained. The Petri dish containing the test oysters was suspended in free-flowing steam over boiling water for a period of 15 minutes, thus allowing 3 minutes to bring the contents of the Petri dish to the desired temperature of free-flowing steam, and then to steam $\frac{1}{2}$ minutes, which is the commercial practice.

CHARLTON LABORATORIES

DAVID B. CHARLTON

Sub. Appendix "B"

[Caption]

**Detailed Reports of Members of Food Panel Making
Consumer Acceptance Test of Canned Oysters at Mary
Cullen's Cottage, Oregon Journal, Portland, Oregon,
June 28, 1948.**

Mrs. Cathrine C. Laughton—Director "Mary Cullen's
Cottage"—Oregon Journal

Stewed Oysters

	No. 1	No. 2	No. 3
Appearance	light in color delicate in ap- pearance	gray—edges ruffled appearance good	brown rather unappetizing appearance
Texture	bit stringy especially on edges	tender on edges but stomach of oyster so full of grit that it was very unpleasant	tender to the point of being mushy—al- most a cooked cereal consistency
Flavor— oyster	slightly chemical but not unpleasant —slight after taste	very good with a fairly fresh flavor	strong and metallic leaves bad after taste
Flavor— broth	good with nice ap- pearance but very little oyster flavor	very good—has true oyster flavor	stale flavor and a rank taste bad after taste

Fried Oysters

Appearance	rather tender to handle but had good appearance when fried	plump and good, frill stands out from oyster	good—uniform in size—plump
Texture	stringy and just slightly tough	good—has distinct texture without mushiness	slightly mushy
Flavor	slightly chemical flavor that hid much of oyster taste	good oyster flavor with a fresh taste	poor flavor except for breeding, would hardly realize that these were oysters

No. 2 was better in many respects in both the stew and fried products. No 2 had a slight residue of sand in the stew. Appearance of No. 1 was better in the stew than either 2 or 3; but doubt if the appearance of either No. 2 or 3 would be at all noticed unless compared.

Mrs. Florence Kirkwood, Asst. Director "Mary Cul-
len's Cottage" (12 years); Graduate Home Economist,
Foods Major (has managed restaurants)

Stewed Oysters

	No. 1	No. 2	No. 3
1. Appearance	Light	Gray	Brownish
2. Texture	Body tender Edge tough	Tender Some sand	Tough parts and others mushy
3. Flavor—Oyster —Broth	Strong Strong and a chemical flavor	Good Good full flavor but mild	Strong Strong flavor and somewhat stale

Fried Oysters

1. Appearance	Frays in handling	Holds shape Larger Dark stomach	Held shape in handling
2. Texture	Tough on edge	Very tender	More tender than in stew
3. Flavor	Definite chemical flavor	Good full mild flavor	Lacking in flavor

No. 2—Held shape best, had almost no tough outer
edge—Had best flavor. Full yet not strong.

Mrs. Crystal Mathews, Oregon Journal (Typical
Housewife)

Stewed Oysters

	No. 1	No. 2	No. 3
1. Appearance	Light	Gray	Brownish
2. Texture	Edge tough but body very tender	Tender A little sand	Not as tender as No. 2 and not as fir
3. Flavor	Salty Both broth and oyster strong Chemical flavor	Good flavor Mild	Strong and slight stale taste

Fried Oysters

1. Appearance	Does not hold shape entirely in handling	Larger and holds shape	Good shape
2. Texture	Edge tough as in stew	Tender	Tender
3. Flavor	Stronger salty taste but good	Mild flavor Very good	Very little oyster flavor. Not as stro: as in stew

No. 2 Best oyster of three but No. 1 best looking be-
fore cooking.

[Caption]

Affidavit of Cathrine Laughton

CATHERINE LAUGHTON, being first duly sworn, deposes and says:

My name is Catherine Laughton. I am now and for several years have been engaged as Director of the Mary Cullen's Cottage. At the request of Mr. David B. Charlton I arranged for a Consumer Acceptance Test in the form of a Food Panel to appraise the quality of various types of canned oysters. I have read the affidavit of Mr. David B. Charlton which reports in full detail on the results of said study. To the best of my knowledge, all of the statements contained in his affidavit are true and correct, and fully and accurately state the results.

CATHERINE LAUGHTON.

[Verification]

[Caption]**Affidavit of Florence Kirkwood**

FLORENCE KIRKWOOD, being first duly sworn deposes and says:

My name is Florence Kirkwood. I am Assistant Director of the Mary Cullen's Cottage. I participated as a member of a Food Panel to appraise the quality of various types of canned oysters. I have read the affidavit of Mr. David B. Charlton which reports in full detail on the results of said study. To the best of my knowledge, all of the statements contained in his affidavit are true and correct, and fully and accurately state the results.

FLORENCE KIRKWOOD.

[Verification]

[Caption]

Affidavit of Crystal Mathews

CRYSTAL MATHEWS, being first duly sworn, deposes and says:

My name is Crystal Mathews. I am a housewife and have also recently been employed by the Oregon Journal. I participated as a member of a Food Panel to appraise the quality of various types of canned oysters. I have read the affidavit of Mr. David B. Charlton which reports in full detail on the results of said study. To the best of my knowledge, all of the statements contained in his affidavit are true and correct, and fully and accurately state the results.

CRYSTAL MATHEWS.

[Verification]

(Exhibit 29—FDC 50)

[Caption]

Affidavit of J. M. Kniseley

J. M. KNISELEY, being first duly sworn, deposes and says:

My name is J. M. Kniseley. I am Manager of Laucks Laboratories Inc., Seattle, Washington. At the request of Willapoint Oysters, Inc., cans of Willapoint oysters, Code Number 190L, and of Surf Maid oysters, Code Number 5948, were purchased on the open market at Seattle, Washington, on June 14, 1948, and an analysis made with results as set out in the attached Report No. 102786-A.

J. M. KNISELEY.

[Verification]

Certificate

LAUCKS LABORATORIES, INC.

Seattle 4, Washington

Report No. 102786-A

Willapoint Oysters, Inc.

423 Bell Street Terminal

Seattle, Washington

Attention: Mr. R. H. Bailey

Gentlemen:

We hereby certify that we have purchased

OYSTERS

on the open market at Seattle, Washington, on June 14, 1948, and we have to report as follows:

Description of Samples

A—Willapoint Steamed Fancy Extra Large

Net contents 10½ oz. avoird.

Seasoned with salt

“Pride of the Pacific” Oysters

Willapoint Oysters, Inc.

Distributors

Seattle, Wash., U. S. A.

B—Surf Maid Brand Oysters

Drained Weight 6½ oz.

Distributed by: Miss Lou Ala Foods Co.

Gulfport, Miss.

Sample A was purchased at: Nelson's Quality Grocery, 325 West Galer, Seattle, Washington; Sample B was purchased at Safeway Stores, Inc., 1st Avenue North and Mercer, Seattle, Washington.

The samples were analyzed with results as follows:

	<i>A</i>	<i>B</i>
Drained weight (ounces avoir. per can)	5.55	6.64
Weight of liquid (ounces avoir. per can)	5.68	4.58
Protein in liquid	2.60%	1.75%
Solids in liquid	9.98%	6.30%
Weight of protein in liquid per can	0.15 oz.	0.08 oz.
Weight of solids in liquid per can	0.57 oz.	0.29 oz.

Respectfully submitted,

LAUCKS LABORATORIES, INC.
By J. M. KNISELEY

(Exhibit 30—FDC 50)

[Caption]

Supplemental Affidavit of David B. Charlton

DAVID B. CHARLTON, being first duly sworn, deposes and says:

I heretofore executed an affidavit in this proceeding on July 1, 1948. With respect to the food value of the so-called "packing medium" or liquid portion of Willapoint canned oysters, I have made an analysis and the results are presented in the table below. The can of oysters, Code No. 115 L, was purchased in the open market at Hasson's Grocery, Portland, Oregon. In the same table, figures for canned beans, peas, and clam bouillon are shown. These figures are taken from "The Canned Food Reference Manual," American Can Co., 1947. The figures for bouillon in the table are from an analysis I made on the contents of a can of Campbell's Bouillon (Beef Broth), Code 2 J 718, purchased on the open market at Hasson's Grocery, Portland, Oregon.

	Protein %	Fat %	Ash %	Moisture %	Carbo- hydrates %
Willapoint Oysters					
Liquid portion only ..	2.32	0.02	1.25	91.27	5.14
Canned green and wax beans	1.1	0.3	0.5	95.1	2.5
Canned peas	3.4	0.3	0.4	88.1	6.8
Canned Clam Bouillon	1.4	2.3	94.8	1.5
Canned Bouillon (Beef broth)					
Campbell's brand	3.68	0.6	2.12	91.9	1.7

It is of interest to note that the liquid portion of Willapoint canned oysters has a significant food value quite comparable to the entire contents of other well known canned foods.

DAVID B. CHARLTON.

[Verification]

APPENDIX F**Rejected Exhibits 39, 40, 41, 43 and 44—FDC 50
(R. 1167-1177)**

(EXHIBIT 39—FDC 50)**(Not admitted)****AFFIDAVIT**

State of Washington, County of Pacific—ss.

GEORGE ESVELDT, having first been duly sworn makes the following statements on oath: I am the manager of the South Bend, Washington, plant of the E. H. Bendiksen Company and have been so employed since October 1, 1944; that in this capacity I am responsible for the packing of the canned Pacific oysters grown, processed, and marketed by this firm.

That the E. H. Bendiksen Company attempted during the period between June 10, 1948, and June 30, 1948, to pack Pacific oysters in compliance with the new fill standard. In making an honest and sincere effort to comply with this regulation the following difficulties were encountered in the plant operation:

1. Filled cans containing eight and one-half ounces of pre-steamed, shucked, washed oyster meats passing under the salt tablet dispenser where they would ordinarily receive a 40-grain salt tablet were so full of oyster meats that in the case of about thirty to forty per cent of the cans, the salt tablet would drop on to the oyster in the top of the can and then bounce off onto the packing table or floor. This, of course, resulted in these cans going to the sealing machine without the required tablet.

2. When the filled cans passing down the chain from

the salt tablet dispenser to the topper and sealing machine passed under the boiling water spray which is used to heat the contents of the cans sufficiently to guarantee adequate vacuum an insufficient quantity of hot water entered the cans. The low vacuum of the resultant pack severely limited its commercial value.

3. In accordance with the recommendations of the American Can Company, our Canco 00-6 sealing machine has, for a number of seasons, been equipped with a topper consisting of four rotating plungers geared to the sealing machine in such a way that each can passing into the machine passes under a plunger which presses down into the top of the can and its contents about one-fourth of an inch. The purpose of this plunger is to force out a sufficient quantity of the water or other packing medium employed to insure a uniform head-space in the sealed cans, without which adequate vacuum in the sealed cans cannot be obtained. As soon as the fill-in weight of the EO cans was increased to $8\frac{1}{2}$ ounces and the cans were conveyed to the topper with two or three oysters projecting from one-half inch to an inch above the surface of the can, a severe loss began to be experienced. The action of the essential topper plunger entering the overfilled cans caused the expulsion of most of the small quantity of water in the top of the can, and in the majority of the instances, also forced a portion of one or more oysters over the edge of the can. This resulted in injury or breaking of these top oysters, and in the filled cans passing to the sealing mechanism with a portion of one or more oysters hanging over the side of the top of the can. The plungers on the

topper were adjusted to the highest possible level commensurate with essential headspace but nothing could be done to correct this unfortunate situation.

4. When the filled cans with projecting oyster meats passed from the topper to the actual sealing mechanism, all the portions of oyster still hanging over the edge of the can were severed and lost, falling into the machinery, and on to the floor around the base of the sealing machine. Since this situation applied to at least half or two-thirds of the cans passing through the machine, a run of only two or three hours produced an actual loss of expensive oyster meats which could be measured by the pound, in addition to the tremendous loss of quality and appearance of the finished product in the can occasioned by the top oyster or two being mangled or cut in two with only a portion remaining in the can. All the ingenuity of the packers and machine man was inadequate to work out a passable solution to this problem and nothing could be done to eliminate the terrific loss in quantity and quality of the expensive oyster meats being processed.

5. An analysis of our payroll data for the June 10th to June 30th trial period when we packed in compliance with the new fill standard as compared with the period of June 1st to June 9th immediately preceding the adoption of this standard, revealed an increased labor cost for grading and packing of 50.4% attributable directly to the increased difficulty of meeting the new fill.

To illustrate some of the problems encountered in complying with the new fill of container for canned oysters the services of a commercial photographer

were obtained to take a series of photographs of our plant operation. These pictures were taken on June 22, 1948, after the plant had been in operation for approximately three hours, and represent accurately the canning losses experienced by this firm every day of the trial period during which an attempt to conform to the new standard of fill was made. The photographer was on hand when the packers finished packing, and the last case or two of filled cans which were ready to be placed on the packing chain were utilized in the photographs. All of the cans shown contain an accurately determined fill of $8\frac{1}{2}$ ounces of pre-steamed, washed oyster meats, packed under commercial conditions, without the packers being made aware that they were anything but routine pack.

Considering these photographs in the sequence of their occurrence on the packing line, I would like to make the following comments:

Picture No. 1—Illustrates the amount of oyster meats required to attain fill-in weight of $8\frac{1}{2}$ ounces. Note that there is practically no empty space in the top of the cans passing down the chain to the salt dispenser. The accumulated salt tablets on the table in front of the tablet dispenser represent the loss of salt tablets occasioned by their bouncing off the top of the full cans in less than one hour, and do not tell the whole story since almost as many tablets fell on the floor during this same period of time. Ordinarily, the machine operator cleans up this salt every few minutes, but on this occasion he was informed less than an hour before the arrival of the photographer

that the tablets lost during the next hour were to be retained. Instead of leaving each tablet in the position where it fell, he misunderstood his instructions and bunched them together into a pile with his hands. No salt tablets were added to or removed from the table, however, during the hour of operation referred to. Naturally, each salt tablet represents a can of oysters that passed to the sealing machine without this essential flavoring and each of those salt-less cans will reach a consumer with inadequate or "flat" flavor.

Picture No. 2—Illustrates the floating up of the oyster meats in the filled cans after they pass through the boiling water spray which is intended to heat the cans for the introduction of vacuum and provide a packing medium of hot water as well. The chain conveying the cans to the machine is moving at a rate of 58 or 60 cans per minute and the oysters continue to rise in the can for a few seconds after they leave the boiling water spray. Careful observation of the cans on the chain and turntable from the end of the hot water pipe to the topper will reveal that the meats continue to float up all the way to the topper. This picture was taken while the chain and sealing machine were in action.

Picture No. 3—Illustrates clearly the operation of the topper plunger on the overfilled cans. The machine operator was instructed to stop his machine with a can of oysters directly under the plunger and this photograph was taken with the machine out of gear. Note the fragment of what was seconds before a perfect whole oyster hanging over the edge of the can under the plunger. Also note how the cans approaching the plunger seem to be bulging with oysters due to the floating action

of the hot water. Attention is called to the fact that the packers of most of the cans shown in this photograph have attempted to wedge the top oyster in the can across the mouth of the can in such a way as to minimize the floating. Note the "roiliness" of the hot water in the cans closest to the hot water spray which indicates that the air trapped in this water from the spray has not yet had time to escape.

Picture No. 4—Illustrates what happens to an oyster when it hangs over the edge of the can during the sealing process. The machine operator threw the canning machine out of gear at exactly the right moment, and the photographer was able to take a still photograph showing part of an oyster projecting from the top of the can as it was being lifted up to the lid. When the machine was placed in gear again a moment later, the overhanging portion of this oyster was clipped off and fell into the machinery. Note similar pieces of lost oyster meats littering the sealer. Naturally if this can were opened later, the top oyster would not be a fancy whole oyster but a mutilated cut oyster greatly inferior in both quality and appearance to the perfect oyster placed in the can only a moment before by a packer.

Picture No. 5—Illustrates the cumulative litter of oyster fragments obtained in less than three hours' operation of this sealing machine. Each small fragment of an oyster represents a can of imperfect pack which has passed through this machine in that time. Despite every effort of the experienced employees to pack and seal a top-quality product a large percentage of the cans passing through the sealer contained one or more badly mutilated oysters.

On the basis of the packing experience acquired during the trial period of June 10th to June 30th it is my opinion that the new fill of container for canned oysters is so excessive as to be commercially impractical for the canning of Pacific oysters.

(s) GEO. D. ESVELDT.

Subscribed and sworn to on this 9th day of July, 1948.

(SEAL)

(s) W. TODD ELIAS,
Notary Public in and for the State of
Washington residing at South Bend.

(Exhibit 40—FDC 50)

(Not admitted)

AFFIDAVIT

State of Washington, County of Pacific—ss.

AMANDA STROMSNESS, first being duly sworn, deposes and states on her oath as follows: I have been employed the past three years as a packer at the E. H. Bendiksen Company oyster plant in South Bend, Washington. I liked packing oysters very much until I had to pack the new fill which we did from about the 10th of June of this year until the end of June. It don't only cut down the speed but it is also hard to pack the oysters in the cans so as not to break them.

The long and skinny oysters take more room than the round and fat ones and so it is almost impossible to get a nice pack out of them. We get lots of both kinds. The long and skinny ones don't weight as much but are even harder to get in the can with breaking them.

With the new weight the oysters have to be crammed down in the can and broken or else left sticking out of the can and later cut off by the canning machine. I did the very best I could and I just don't see how I can do the new pack and make them fit or look as nice as they should. I hope we don't have to pack the heavy weight.

AMANDA STROMSNESS.

Subscribed and sworn to before me this 9th day of July, 1948.

(SEAL)

W. TODD ELIAS,
Notary Public in and for the State of
Washington residing at South Bend.

(Exhibit 41—FDC 50)

(Not admitted)

AFFIDAVIT

State of Washington, County of Pacific—ss.

CLARA SMITH, having first been duly sworn on oath makes the following statement: I have been employed at E. H. Bendiksen Company as an oyster packer for one season. This oyster company is located in South Bend, Washington.

All through the past season we packed oysters at the plant with a six and three-quarter ounce packing weight until the last three weeks of June just before the cannery closed for the season, when we were told by our foreman, Mr. Alvenes, that we had to pack heavier cans for the rest of the month. The new weights we were given to pack with weighed eight and one-half ounces and as soon as we started to

use the new weight we ran into a lot of trouble. It took us a lot longer to fill the cans because we had to pick the oysters over so much to get the right size and shape to pack in the can, and we had to put so many oysters in the can to get our counterweights to balance that we had to "cram" them in. Steamed oysters are pretty tender and jamming them into the can caused a lot of tearing and breaking which we never had before.

We girls on the packing line disliked packing the new weight because we have always been cautioned to not pack anything but perfect oysters and we hated to see the top oysters in the can we packed being mashed and cut off in the sealing machine. In order to get enough weight in the cans we had to leave oysters sticking out the top of the can most of the time and they were smashed when the cans went through the machine.

One trouble I had was in getting the right weight in the can with the large oysters. When the can was almost full one more oyster made too much weight and the meat stuck out of the can, and if I took one oyster out of the can the weight would be too low.

I think the new weight is entirely too much to make a decent looking can of oysters and I couldn't pack the weight without crushing and ruining my oysters.

(s) CLARA SMITH,

Subscribed and sworn to before me this 9th day of July, 1948.

(s) W. TODD ELIAS,

Notary Public in and for the State of
Washington, residing at South Bend.

(SEAL)

(Exhibit 43—FDC 50)

(Not admitted)

AFFIDAVIT

State of Washington, County of Pacific—ss.

MAUDE BAIRD, being duly sworn deposes and states on her oath as follows:

I am employed at E. H. Bendiksen Company in South Bend, Washington, as an oyster packer. I have been employed in the oyster industry as a packer for about four years.

I do not like the new pack because my speed was cut down considerably. This pack, I feel, will not work out satisfactorily because the quality of the oysters when put in the cans is good, but by trying to get the new weight the oysters are broken up and crammed into the cans, which leaves no space for the liquid to cover all the oysters, therefore hurting the appearance of the oysters, and in time ruining the sale of the product, I'm sure.

There is another angle. The size of the oysters vary for each season so that the weight is very hard to get exact. The oysters may look like they will weigh heavy but still not weigh enough, then some oysters are small, others are long and skinny. The large ones have to be broken up to make the exact weight.

We are warned continually to not break the oysters and pack them in the cans so that every oyster, when taken out of the can looks the same as when they were put in the cans.

So I can't see how the new weight can possibly work out to satisfaction.

(s) MAUDE BAIRD,

Subscribed and sworn to before me this 9th day of July, 1948.

(s) W. TODD ELIAS,
Notary Public in and for the State of
Washington, residing at South Bend.

(SEAL)

(Exhibit 44—FDC 50)

(Not admitted)

AFFIDAVIT

State of Washington, County of Pacific—ss.

FANNIE STOUTENBURG, having first been duly sworn makes the following statement on oath:

I started working in the E. H. Bendiksen Company oyster plant in October of 1947 and I like to pack oysters very much, but when we had to start on the new fill I found it much slower. We had to try and get too many oysters into the can to get the right weight and when we had the long skinny ones you couldn't help breaking them.

Our foreman has always told us that we shouldn't break our oysters any so that way I found it very hard to get the right weight with this new fill. I don't think this new fill looks so nice in the cans because there would be oysters sticking up in the cans which got cut off in the canning machine. I just think the new fill is too much.

(s) FANNIE STOUTENBURG,

Subscribed and sworn to before me this 9th day of July, 1948.

(s) W. TODD ELIAS,
Notary Public in and for the State of
Washington, residing at South Bend.

(SEAL)

In the United States Court of Appeals
for the Ninth Circuit

WILLAPOINT OYSTERS, INC., *Petitioner*,

v.

OSCAR R. EWING, Federal Security Administrator, and J.
DONALD KINGSLEY, Acting Federal Security Adminis-
trator, *Respondents*.

On Petition to Review Orders of the Federal Security
Administrator

BRIEF OF RESPONDENTS

ALEXANDER M. CAMPBELL,
Assistant Attorney General.

FRANK J. HENNESSY,
United States Attorney.

Of Counsel:

JOHN T. GRIGSBY,
Attorney, Department of Justice.

WILLIAM GOODRICH,
Attorney, Federal Security Administration.

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In the United States Court of Appeals for the Ninth Circuit

No. 11936

WILLAPOINT OYSTERS, INC., *Petitioner*,

v.

OSCAR R. EWING, Federal Security Administrator, and J.
DONALD KINGSLEY, Acting Federal Security Administrator, *Respondents*.

Brief for the Federal Security Administrator

JURISDICTION

This is a special statutory proceeding for judicial review of an order of the Federal Security Administrator which established a definition and standard of identity and a standard of fill of container for canned oysters. The order, which is by nature rule-making in that it establishes regulations of general applicability, was promulgated under authority of Section 401 of the Federal Food, Drug, and Cosmetic Act [21 U. S. C. 341].

The order under attack was issued on March 10, 1948 [13 F. R. 1337]. The authority of this court was invoked by a petition for judicial review filed on May 22, 1948. Jurisdiction to review the administrative action exists by reason of Section 701(f) of the Act [21 U. S. C. 371(f)].

This court, after acquiring jurisdiction, issued an order under Section 701(f)(2) [21 U. S. C. 371(f)(2)] on July 7, 1948, remanding the proceeding to the Federal Security Administrator with direction to take additional evidence

relative to a new process of packing blanched oysters. As directed, the Federal Security Administrator took the additional evidence, and, within the 30-day period that was allowed, reported findings on the new evidence back to the court. These findings did not change the findings previously made but were supplementary thereto. They were made by the Acting Administrator during the absence from duty of the Administrator.

The petition for judicial review was revised and now appears in the record as Petitioner's First and Second Supplemental Petitions for Judicial Review and for an Order Permanently Setting Aside an Order of the Federal Security Administrator Establishing Definitions and Standards of Identity, Quality and Fill of Container for Canned Oysters. These petitions attack the order as issued and the supplemental findings.

The Administrative Procedure Act, 5 U. S. C. 1001, *et seq.*, does not affect the court's jurisdiction, nor does it alter the rights of review provided in the Federal Food, Drug, and Cosmetic Act.¹

¹ *Attorney General's Manual on the Administrative Procedure Act* (1947). The Manual states: (p. 93) "The provisions of section 10 constitute a general restatement of the principles of judicial review embodied in many statutes and judicial decisions. Section 10, it must be emphasized, deals largely with principles. It not only does not supersede special statutory review proceedings, but also generally leaves the mechanics of judicial review to be governed by other statutes and by judicial rules . . . Accordingly, the general principles stated in section 10 must be carefully coordinated with existing statutory provisions and case law."

* * * * *

(p. 95) The introductory clause of section 10 "reads '*Except so far as* (1) statutes preclude judicial review,' with the clear result that some other statute, while not precluding review altogether, will have the effect of preventing the application of some of the provisions of section 10. The net effect, clearly intended by the Congress, is to provide for a dovetailing of the general provisions of the Administrative Procedure Act with the particular statutory provisions which Congress has molded for special situations . . ."

The Manual, citing the Federal Food, Drug, and Cosmetic Act as an example (p. 97, note 9), states: "Under such statutory provisions, the filing of a petition to modify or set aside agency action will continue to be the required form of proceeding for judicial review."

The Manual also explains that Section 10(e) "restates the present law as to the scope of judicial review." (p. 108).

STATEMENT OF THE CASE

This case, while made to appear formidable by the petitions for review, the extensive brief filed by petitioner, and the record of administrative action, involves a very simple problem. Petitioner challenges a rule-making order which identifies, defines, and regulates the minimum fill of container for canned oysters. The principal contentions are (1) that the regulation, which requires that canned oysters be so filled as to yield a drained weight of 59% of the water capacity of the container, was not made in accordance with the provisions of the Federal Food, Drug, and Cosmetic Act; and (2) that the administrative process on which the regulation was based is infected by procedural errors. We shall show that the order was regularly made in careful observance of the procedural safeguards provided by law and is supported by the evidence.

(1) *Historical Background.*

Oysters are canned commercially in three areas of the United States, the South Atlantic coastal area, the Gulf area, and in the Pacific Northwest. The markets for the food product are primarily in the mid-west and in the western states.

Interstate distribution of this food was, until 1938, subject to regulation under the Federal Food and Drugs Act of 1906 [21 U. S. C. A. §§ 1-15]. That statute contained no prohibition against slack-filled containers. In 1930, the McNary-Mapes Amendment (46 Stat. 1019) authorized the Secretary of Agriculture to establish standards of fill of container for canned foods. No standard of fill of container for canned oysters was adopted. [See 21 CFR § 1.201 et seq.]. The food Inspection Decisions (Br. App. D, pp. 35-40) which were issued long before canning of oysters on the west coast, are in no sense standards of fill of container, but an official expression by the Food and Drug Administration that canned oysters packed to yield 5 ounces of drained weight from the No. 1 EO can would not be considered adulterated in that excessive brine had been substituted in part for oysters.

Before 1942, canners of oysters in all areas filled the No. 1 EO can, the can in principal use, to yield a drained or cut-out weight of 5 ounces of oysters. In 1942 the supply of tin plate became short, and the War Production Board decided that there was wastage of tin plate in oyster canning because of the light 5 ounce fill. The Food and Drug Administration had done experimental work to determine what was a proper fill of container for canned oysters, and that work was made available to WPB. Conservation Order M-81 was issued, and it effectively denied tin plate to oyster canners except where the cans were filled to yield at least 7½ ounces of oysters from the No. 1 EO can.

Shortly thereafter, the Federal Security Administrator announced that a public hearing would be held, under the Federal Food, Drug, and Cosmetic Act, upon a proposal to establish a fill of container standard for canned oysters. Public proceedings were held in accordance with law, and on November 18, 1944, the standard was promulgated [9 F. R. 14008; 21 CFR 1944 Supp. § 36.6]. It required a drained weight of not less than 68% of the water capacity of the container (7½ ounces for the No. 1 EO can). Canners of Pacific oysters had discontinued canning in 1942. (Finding 12.) The standard was made to apply to canned oysters that averaged less than ½ ounce each, and was largely inapplicable to Pacific oysters because they averaged more than ½ ounce. (Finding 12.) That order was not challenged.

In the spring of 1946, canning operations began anew on the Pacific coast, and there soon appeared in the same markets in competition canned Pacific oysters in the No. 1 EO can with cut-out weight of approximately 5 ounces and Atlantic and Gulf oysters in the same size can with cut-out weight of 7½ ounces of oysters. The difference in amount of oysters present was known to wholesale dealers, but was not generally known to retailers or to consumers, with the result that there was likelihood of deception of consumers who would purchase the canned product on the basis of size of container alone without knowledge of the

weight differential. The existing standard gave a decided competitive advantage to canners who were not bound by it and who were using the 5-ounce fill.

(2) *The March 10, 1948, Order.*

The Federal Security Administrator's order was made upon the basis of notice, public proceedings, findings of fact, and a tentative order. The Food and Drug Administration, canners of Pacific oysters and canners of Gulf oysters participated.

a. *Standard of Identity.*

Insofar as this proceeding is concerned, the Administrator found that oysters are canned commercially on the Atlantic, Gulf, and Pacific coasts, the Atlantic and Gulf species being commonly known as "oysters" or "Cove oysters" and the Pacific species being known commonly as "Olympia Oysters" and as "Pacific Oysters." (Finding 1); that Pacific oysters are much larger and somewhat more tender than Eastern oysters (Finding 2); and that, while the basic methods of canning are essentially the same (Findings 2-3) and the canned oysters are sold in the same trade channels, consumers distinguish between them on the basis of difference in size (Finding 5). A standard of identify was established which defined the product as any one or a mixture of specified forms of oysters together with a packing medium, and salt added as seasoning. The standard provided that:

§ 36.5(c)(1) . . . the name of the food is "Oysters" or "Cove Oysters," if of the species *Ostrea virginica*; "Pacific Oysters," if of the species *Ostrea gigas*; "Olympia Oysters," if of species *Ostrea lurida*.

This provision, which appeared in the proposal made a part of the notice of hearing, was not at all disputed at the hearing or until April 29, 1948, when petitioner filed with the Administrator a petition for further hearing, reopening, revision, and oral argument. No evidence on the point was presented by Petitioner at the hearing held in response to the Court's order of remand.

b. *Fill of Container.* The Administrator's findings, reciting first the existing requirements as to fill of container (Findings 1-3), were to the effect that the 7½ ounce fill requirement to which Eastern and Gulf packers had been subject caused minor manufacturing difficulties and some changes in the oysters (Finding 3); that canned Pacific oysters packed to the cut-out weight in use prior to 1942—or 5 ounces—were not well filled (Finding 4); that sale in the same markets of No. 1 cans of oysters some of which were filled to yield 7½ ounces of meat and some of which were filled to yield only 5 ounces was a condition likely to confuse and deceive consumers who generally did not know of the difference in fill (Finding 5); that there had been no commercial packing of Pacific oysters where the cans were filled to capacity and thus no basis of commercial experience on which to determine the maximum fill which could be used without quality impairment (Finding 6); but that experimental packs were made in West Coast canneries both by canners of Pacific Oysters and by the Food and Drug Administration revealed that Pacific oysters could be packed to yield a cut-out weight of at least 6½ ounces from the No. 1 can without significant impairment of the quality of the food (Findings 6-8). Finding 6 addressed itself to the quality factors which the canners' committee had emphasized in showing quality deterioration, and was that, except for the condition called "pressure", there is no correlation between the incidence of the adverse conditions and the increased fill of container when the percent of oysters showing defects is considered. As to "pressure," it was found that the flattened area is not unsightly and does not affect the cooking quality of the food.

The Administrator concluded that it would not promote honesty and fair dealing in the interest of consumers to return to the 5 ounce fill; and that honesty and fair dealing in the interest of consumers would not be promoted by establishing separate standards of fill of container for oysters of different sizes or species. He concluded also that a 6½ ounce drained weight from the No. 1 can could

be met by all canners with any heat treatment and without quality impairment. The final conclusion was:

On the basis of the evidence of record and the foregoing findings of fact and conclusions, and taking into account the difference between commercial canning and experimental canning, it is concluded that a standard of identity that will promote honesty and fair dealing in the interest of consumers is a standard based on drained weight of oysters, applicable to oysters of all sizes and species in cans of various sizes, requiring that the drained weight of oysters be not less than 59 per cent of the water capacity of the can."

The standard was fixed accordingly. [13 F. R. 1337].

(3) *The Remand and the August 3 Order.* Petitioner included in its petition for review, filed May 22, 1948, a motion for leave to adduce additional evidence. It represented (Pet. Rev. 14) that subsequent to the hearing in this matter it developed and put into commercial operation an entirely new method of preparing canned oysters. The method was described (Pet. Rev. 14) as a blanching method of preparing fresh-opened oysters for canning. Petitioner claimed that the record contained no evidence as to the new method of preparing oysters for canning, that the order of March 10 would preclude use of the new method, and asked the court to remand the proceeding to the Federal Security Administrator with directions to take additional evidence as to the new method of preparing oysters for canning and as to the relationship of the new method to a reasonable standard of fill of container (Pet. Rev. 19-21).

A motion for temporary stay of the March 10 order was noticed for hearing on June 7, 1948. The motion, and supporting affidavit of R. H. Bailey, also represented that the petitioner had developed a new method of preparing oysters for canning, that it wished to adduce new evidence from "skilled observers," "consumers and users," "expert testimony of scientists," and as to "practical operating results" which evidence was said to have been unavailable at the time the hearing was held. (Motion, May 22, 1948, 3-5). The affidavit suggested that petitioner's

business would be destroyed by the order, and that the order was impossible of compliance in that plant production could not be promptly converted.

The court granted the motions by an order dated June 8, 1948. The court, finding (p. 2) that the additional evidence was material and that there were reasonable grounds for failure to adduce it at the hearing, ordered the proceeding remanded "with direction to take such additional evidence (and any evidence in rebuttal thereof) as may be offered relative to the said process of packing blanched oysters, within a period of 30 days from the date of this Order on such reasonable notice to the petitioner as he may give." (p. 3). In accordance with the Act, it was ordered that the Administrator make findings and a recommendation on the new evidence. The Administrator's return was to be made within 30 days from the date of the hearing (p. 3).

On June 17, 1948, the Administrator issued a notice of hearing (13 F. R. 3376) to be held on July 7 in Washington, D. C.,

"to receive such evidence as may be adduced by Willapoint Oysters, Inc., as to its alleged new method of preparing oysters for canning and as to the relationship of such method to a reasonable standard of fill of container, as contemplated by the Federal Food, Drug, and Cosmetic Act, for canned oysters. Rebuttal evidence may be adduced by any interested party."

The hearing convened at the time and place provided in the notice. Willapoint Oysters, Inc., the Food and Drug Administration, and representatives of Gulf and Pacific canners appeared.

While it might have been expected that the petitioner would present its case in the manner suggested in its motion for remand, it contented itself with the oral testimony of Mr. R. H. Bailey and six affidavits (Ex. 25-30). Mr. Bailey presented no testimony based upon an attempt to meet and then evaluate the 6½ ounce fill. He testified on cross-examination as follows (R. 776):

Q. Have you ever packed, using your cannery equipment, personnel and procedure, to achieve a six and one-half fill, on any cans?

A. No, sir.

Nevertheless, the substance of his testimony was that:

“Our own experience shows repeatedly that it is impossible to can blanched oysters so as to comply with a 6½ ounce standard of fill without a substantial increase in the incidence of pressure, deformities and browning. A 6½ ounce fill does result in a substantial deterioration in quality for our new blanched processed oyster (R. 747).

That statement is repeated for emphasis in petitioner’s brief (Br. 40).

On the other hand, the Food and Drug Administration set to work even before the court’s order of remand was received to make a thorough investigation to ascertain the facts which would guide to a proper standard of fill. The day after the remand, instructions were issued to the Seattle station (R. 797-799). Blanched Pacific Oysters were packed under commercial conditions in three different plants, the only plants then in operation, to provide facts for an evaluation of the 6½ ounce fill requirement (R. 859). One of the plants was that of Willapoint Oysters, Inc.

On the basis of the evidence taken, the Acting Administrator¹ found:

a. *Standard of Identity.*² The commercial practice of canning Pacific oysters without pre-steaming in the shell began in the 1947-1948 season. The oysters were raw shucked, washed, immersed in a hot brine solution and there blanched for 30 to 60 seconds. They were then removed, washed, held in warm water, and canned. The treatment in the boiling brine causes raw oysters to lose water and soluble solids approximating 16% by weight. This loss is not significantly different from the loss which occurs on light pre-steaming in the shell. After processing

¹ The Administrator was absent from duty.

² The modification of finding 6 apparently is unquestioned.

in the can, oysters prepared after blanching have a slightly different flavor than do oysters prepared after pre-steaming, and the liquid taken from cans of blanched oysters has more fine particles of oyster material in suspension. (Finding 2).

b. *Fill of Container.* Ten additional findings were made. The Acting Administrator found that Pacific oysters canned after blanching are no better than those canned after pre-steaming and many persons regard them as inferior because of material suspended in the liquid and because they break more readily. Blanched oysters have not been differentiated in their commercial exploitation from oysters prepared after pre-steaming (Finding 9). To attain a given drained weight of oysters account must be taken of the changes in the food which occur during preparation for and in canning, the most significant of which is the loss of liquid from the oysters during heat treatment. The total amount of liquid which separates from the oysters is approximately the same whether the oysters are packed in the container raw, given partial cooking by blanching, or partly cooked in the shell by pre-steaming. The difference is that with raw oysters the loss occurs in the can whereas in the other instances the loss occurs partly in the can and partly during the pre-can operation. The blanching loss and the light pre-steam loss approximates 16% by weight, the pre-steaming loss generally being slightly greater. The put-in weight of oysters, therefore, is not an accurate measure of fill of container and would be only if all oysters were pre-cooked to the same degree before weighing into the cans (Findings 10-14).

When a 5 ounce cut-out weight is used for blanched oysters a put-in weight of approximately $7\frac{1}{2}$ ounces is necessary; and for a 7 ounce cut-out a put-in of approximately $9\frac{1}{2}$ ounces is required. Thus the lighter drained weight permits a canner to replace 2 ounces of blanched oysters with 2 ounces of water (Finding 12). The liquid drained from canned oysters has food value and flavor, but it is much less valuable than the oyster meat and the

smaller the put-in weight of oysters the greater the water addition to make up the packing medium (Finding 15).

The 5 ounce cut-out can is slack-filled, and no new equipment and no significant change in canning procedure is required to meet the $6\frac{1}{2}$ ounce fill (Finding 16). Based upon the number of oysters showing defects, there is no real difference between canned oysters filled to yield 5 ounces of drained weight and those filled to yield $6\frac{1}{2}$ ounces whether they were pre-steamed or blanched prior to canning (Finding 17).

Except for slight difference in flavor and appearance, the food value of the liquid packing medium is approximately the same in cans having the same drained weight regardless of the method used in preparing oysters for canning. As drained weight increases, packing medium decreases, and the flavor and food value of the liquid packing medium is inversely proportional to the amount of water added to make up the packing medium (Finding 18).

The Acting Administrator concluded that there was no basis for prescribing separate standards upon the method of preparing oysters for canning; that it would not promote honesty and fair dealing in the interest of consumers to base the standard on put-in-weight or method of preparing oysters for canning; but that it will promote honesty and fair dealing to base the standard of fill of container on drained weight without differentiation as to whether the oysters are canned raw, or are blanched or pre-steamed before canning. The standard prescribed in the March 10 order was adhered to.

ARGUMENT

Introductory. Petitioner attacks almost every finding of fact made by the Federal Security Administrator, and it contends that serious procedural errors have been made in the administrative process. The "concise summary" (Br. 73-75) reveals that the errors of substance most seriously complained of are (1) that the standard of identity unlawfully requires that petitioner's product be labeled "Pacific Oysters"; and (2) that the standard of fill of con-

tainer is invalid because it would "destroy petitioner's quality pack by requiring that an excessive quantity of its Western oysters be crammed into the can with resultant discoloration, disfiguration, distortion, and breakage."

It should be remembered that the problem facing the Federal Security Administrator was one of administrative regulation or legislation; and, as in the ordinary process of legislation, there arose the delicate problem of where to draw the line in establishing the standard fill of container. In testing the reasonableness of the line which was drawn, the issue cannot be whether it may have been drawn at some other point. Clearly, in this type of action it rarely can be established that any particular standard is impelled as the only correct one. The process of arriving at a proper regulation, like the congressional process of arriving at the terms of a statute, is not a matter of simple mathematical or logical deduction leading to a single answer. Reasonable men basing action on the same facts and findings could arrive at entirely different regulations, none of which could properly be characterized as arbitrary, whimsical, or unreasonable. The test of the validity of the regulation, if judicial judgment is not entirely to replace administrative expertise in this specialized field, must be limited to the inquiry whether the particular alternative which the administrative agency selected, among several alternatives, to achieve the objective of the Act is one which a rational person could have chosen. *Final Report of Attorney General's Committee on Administrative Procedure*, Sen. Doc. No. 8, 77th Cong., 1st Sess., 117.

The statute and the cases arising under it, establish the rule that upon review the courts are not to substitute their judgment for that of the Administrator, and that the Administrator's "judgment, if based upon substantial evidence of record and if within statutory and constitutional limitations, is controlling even though the reviewing court might on the same record have arrived at a different conclusion." *Federal Security Administrator v. Quaker Oats Co.*, 318 U. S. 218, 227-228.

Our reply to the very lengthy brief filed by the petitioner will be divided into three general parts. First, we shall consider the substantiality of the evidence to support the Administrator's findings. In this, we are content to rest primarily upon a sincere request that the Court consider the pages of transcript and the exhibits cited by the Administrator and Acting Administrator in order to determine that the findings have overwhelming support in the evidence. Second, we shall show that the choice of standards made by the Administrator was a reasonable one. Third, we shall meet the procedural objections argued by the petitioner. We shall show that the findings have ample support, and that no significant procedural error invalidates the administrative action.

A.

The Administrator's Findings are Supported by Substantial Evidence and No Evidence of Record Has Been Disregarded or Ignored.

The attack made by Petitioner on the findings and conclusions of the Administrator goes to every finding and conclusion that has been drawn. The contentions appear, under the heading "Unsupported by Substantial Evidence" (Br. 54 *et seq.*), but for the most part they are addressed either to the weight or dependability of the evidence supporting the findings or simply call attention to other, sometimes conflicting, evidence on which petitioner relies. In this there appears a thinly veiled attempt to have this court re-weigh the evidence, re-write the findings, and draw different conclusions. This, of course, the statute forbids. Cf. *Opp Cotton Mills v. Administrator*, 312 U. S. 126, 156. In this connection, it may be observed that petitioner makes no effort to consider the page references given with the findings which guide the reader to the pertinent portions of the record. Instead, petitioner insists—pointing to other pages of the record and to other exhibits—that the findings should have been made in different terms.

Petitioner asserts that the findings are slanted and distorted. An examination of the specifications which are

referred to and relied upon to support this claim, disclose that in the most part the complaint is that the findings fail to include certain of the testimony received in behalf of the canners. Petitioner has not attempted to point to any finding or any portion of any finding which is not supported by substantial evidence. All that is shown is a disagreement between the petitioner and the Administrator as to what the findings should contain. The generally accepted rule is that findings of fact should be findings of ultimate fact as distinguished from the evidentiary facts or a resume' of the evidence. 53 Am. Jur. 795; *P. H. and F. M. Roots Co. v. United States*, 17 F.(2d) 337 (C. C. A. 7). The requirement of essential findings does not require a impractical exactness. *Florida v. United States*, 292 U. S. 1, 9; *United States v. Louisiana*, 290 U. S. 70, 78. The detailed findings of fact required under Section 701(e) of the Act as the basis of the order are not expected to be an examiner's report.

The crucial findings appear both under standard of identity and standard of fill of container. The first is that the common name of the species *ostrea gigas*, when canned, is "Pacific oysters." The other appear in both the March 10 and the August 3 order. They are concerned with the issue whether canned oysters, packed to yield 6½ ounces of drained weight from the No. 1 EO can, are so affected in quality that the lower fill of 5 ounces is reasonable for Pacific oysters prepared for canning by a blanching process. Petitioner argues that 6½ ounces of oysters is too much for the 11-ounce can—it wishes to continue packing to yield only 5 ounces.

1. All of the Evidence Supports the Finding that the species *ostrea gigas* is commonly known as "Pacific Oysters" when canned.

The petitioner's brief argues that the standard of identity cannot stand because it unlawfully forces upon Willapa's product the name "Pacific Oysters" and gives the product of the Atlantic and Southern packers exclusive rights to the name "Oysters."

The point is made that the order would "change the accepted name of the food long used by petitioner and other

West Coast packers" (Br. 8); would "confer on Southern packers a new and exclusive right to label their products by the generic description 'Oysters'" (Br. 10, 30-31); and that Finding 1 "that oysters of the *ostrea gigas* type are commonly known as 'Pacific Oysers'" is unsupported by substantial evidence "to the extent that it omits to find that oysters of the *ostrea gigas* species are and also have been 'commonly known,' 'when canned,' as 'Oysters,'" (Br. 54-55, 58). It is said also that Finding 1 is in excess of statutory jurisdiction; that the conclusion that the name of the food is "Pacific Oysters" if the species *ostrea gigas*, is without the requisite findings of fact as to the 'common or usual name, so far as practicable'"; and that the Administrator's action denying Willapoint's petition of April 29, 1948, was unreasonable, arbitrary, capricious, and an abuse of discretion in failing to revise the March 10 order so as to permit petitioner to continue to use the name "Oysters" (Br. 699-70). Finally, the order is attacked as contrary to constitutional right in taking petitioner's property without due process of law by requiring it to abandon its long-continued use of the term "Oysters" (Br. 71; see also Br. 73-74).

The argument on this point appears at pages 111-113, 116-117 of petitioner's brief.

Petitioner takes up some of the page references cited for Finding 1. We respectfully refer the court to those pages to show that petitioner's criticisms are not well founded. Its treatment of the pages is distorted and unfair. Next, petitioner points out that Mr. Callaway, a Food and Drug Administration witness referred to the *ostrea virginica* as "Southern" or "Cove" oysters. It fails to mention his testimony where he testified that the common or usual name of that species "is simply oysters or cove oysters" (R. 35).

We have pointed out earlier that the proposed regulation which was a part of the notice of hearing and the tentative order issued after the hearing included provisions that the name of the *ostrea gigas* species is "Pacific Oysters." The tentative order included a finding that that species

is commonly known as "Pacific Oysters." No exception was taken to the finding or to the provision of the tentative order based upon the finding. Neither did the Mitchell petition raise the point. It was first made in the petition filed by petitioner's present counsel with the Administrator on April 29, 1948, after the final order had issued.

There is no need, however, to rest upon the failure to offer evidence or to object to the tentative order. The record is replete with evidence which amply supports the Administrator's finding and the provision of the final order.

There was testimony from Mr. Joseph Callaway (R. 16, 18, 33-35, 66, 694) and Mr. Sumner C. Rowe (R. 95), who appeared on behalf of the Food and Drug Administration, to support this finding. All of the witnesses who appeared on behalf of Pacific packers called the product "Pacific Oysters" or "Pacific Coast Oysters." (Esveltd R. 380, Bendiksen R. 447, Clough R. 566, Weigardt R. 613, Bailey R. 727).

Mr. Bailey, president of Willapoint Oysters, Inc., stated (R. 522) that he was a canner of "Pacific Oysters" (See also R. 528). He agreed with Dr. Kinkaid's testimony without reservation. (R. 526). Dr. Kinkaid testified (R. 178-179) as follows on cross-examination by counsel for the Food and Drug Administration:

Q. At the present time, are not a considerable portion of Pacific Coast canned oysters simply designated as oysters?

A. I have not looked at the labels of the different ones, but I do not think that is the case. I think they are all marked with Pacific Coast oysters, as far as I know. I do not know of any that are not so designated or designated in a different way.

Q. You are not familiar with the labeling?

A. I have seen the label, and I have not seen any label that did not carry the Pacific Coast mark.

Petitioner mentions (Br. 112) the first question in this colloquy to show that the Government's counsel apparently knew that the common or usual name of both species of canned oysters was simply "oysters." But, characteristically, it omits the answers of Dr. Kinkaid.

Petitioner cites two examples of labeling where the name "oyster" is not qualified by the word "Pacific." Its own label, one of the examples cited, definitely marks its product as Pacific oysters, but it is true that "Pride of the Pacific" is in smaller print than is the name "oysters." (Ex. 31.)

Petitioner overlooks the fact that two labels are shown on Exhibit 32 which give the name of the food as "Pacific Oysters." One of these is the product of Northern Oyster Company. The cans are marked 79141 H(2) and (3). The other is the product of E. H. Bendiksen Co. marked "East Point Pacific Oysters". The cans are marked 79120 H(2), (3), and (14). Exhibit 27, presented by petitioner, contains cutting data on processed "Pacific Oysters." Exhibit 37 contains an affidavit of E. N. Steele in which it is stated that the *ostrea gigas* species of oysters are commonly known as "Pacific oysters".

There are two reported decisions arising under the Federal Food, Drug, and Cosmetic Act on this point. They are *Twin City Milk Producers Ass'n. v. McNutt*, 122 F. (2d) 564 (C. C. A. 8), and *Columbia Cheese Co. v. McNutt*, 137 F. (2d) 576 (C. C. A. 2).

In the *Twin City* case, the Court said at page 568:

What was the common or usual name of the food product here involved, and whether its use in a regulation would be practicable for administrative purposes, were questions for the Administrator, on which we would not be at liberty to disturb his determination, if based upon substantial evidence . . . there could ordinarily be no arbitrariness involved in using the common or usual name of such a product for regulation purposes.

And in the *Columbia Cheese Co.* case, the Court met the contention that use of the name neufchatel cheese was not practicable. Said the Court at page 580:

The petitioners also argue that the Administrator did not use the name, so far as it was practicable, which commonly identified the product sold; and that in the absence of a specific finding that it was not practicable

to label their product cream cheese, the regulations identifying these various groups of cheese must fall. The practicability of one name or another name is not, of course, a matter for our judgment. Even though the name chosen would drive a healthful product from the market . . . that name or the name withheld from the product cannot be said by us to be unreasonable or improper so long as there were findings and substantial evidence to support them which justified the action of the Administrator.

Here, the food was identified under the name "canned oysters," but because of the difference in size of oysters and because the *ostrea gigas* type has utility as a frying oyster, the Administrator required that the label designate the form of the oyster component, i. e., whether whole, pieces, or cuts and whether oysters or Pacific oysters or Olympia oysters.³

The Administrator's action was supported by all the evidence of record.

2. There is Substantial Evidence to Support the Findings that Pacific Oysters can be Packed to meet a 6½ Ounce Drained Weight Requirement Without Quality or Appearance Impairment.

Petitioner's concise summary (Br. 73-74) argues that the 6½ ounce fill requirement of the order would result in excessive crowding of oysters in the can and with it "discoloration, disfiguration, distortion, and breakage" thereby destroying "the quality pack of Western oysters" as produced by petitioner.

The fundamental principle on which the standard of fill of container was based is that a non-transparent container—such as a can—serves not only as a packing receptacle but also as an index to consumers as to the quantity of food contained therein. It is common knowledge that as between non-transparent containers with the same amount of food, consumers will choose the one that is largest unless considerations of price impel a different selection.

³ See for comparison 21 CFR Cum. Supp. 27.0(6) which requires that canned peaches be labeled to specify the variety, Freestone or Cling, White or Yellow, and the form, whole, halves, quarters, sliced, etc.

The Food and Drug Administration long has operated upon the principle—accepted throughout the canned food industry—that the can should be filled to the greatest extent practicable for packing and processing without injuring the quality and appearance of the contents. Brine is a permitted addition only to the extent necessary to fill the interstices of the can and to cover the product.

Every witness at the hearing agreed that there should be but one standard of fill of container for canned oysters and the Administrator concluded that separate requirements of fill for a single sized can would likely confuse and deceive consumers. It is entirely clear that the No. 1 EO can packed to yield but 5 ounces of oysters is slack-filled. It cannot be disputed on this record that enough oysters may be placed in the can to give a 6½-ounce cut-out weight. The only question seriously presented is whether the higher drained weight results in quality impairment to an extent that would make it illegal.

The Food and Drug Administration's preparation for the hearing on proposals to fix a standard of fill of container for canned oysters began insofar as the record is concerned in May, 1945. An inspector of the Food and Drug Administration prepared a number of experimental packs of canned Pacific oysters in the Oyster Growers Service Association cannery at North Bend, Washington. The details of the work are shown in Exhibit 9 and are discussed beginning at page 97 of the record. The regular factory treatment, with two minor exceptions, was followed from the time of shucking until the oysters were packed in the cans. (R. 102.) The results show that a put-in weight necessary to attain drained weights from 6.75 to 8.46 ounces were made without difficulty (R. 107). Examination of the cans by Mr. Rowe, a witness at the hearing, showed that the oysters taken from them were normal in appearance (R. 106). No pressure in packing was required. (Ex. 9.) The only appearance defects noted were liver spots which are clearly unrelated to fill (Ex. 9(a) and (c)).

The second experimental packs were prepared in April, 1946, by another inspector of the Food and Drug Admin-

istration in the cannery of Willapoint Oysters, Inc., at Bay Center, Washington. This is discussed beginning at page 108 of the record. The details are reported in Exhibit 10. The cans used were No. 1 tall cans, 301-411 in size. This pack was made with ordinary cannery procedure to meet a higher requirement for fill and the desired put-in weight was easily obtained without exerting pressure on the oysters. (Ex. 10.) The results showing the cut-out weights are disclosed at page 115 of the record. The appearance of the oysters was normal (R. 114), the exhibit showing that in a few instances the top oyster was flattened and in two cans there was a slight discoloration (Ex. 10(c)).

In February and March, 1947, another pack was made by Mr. Rowe and Inspectors Risley and Hansen in the cannery of the Coast Oyster Co., South Bend, Washington, now operated by the Petitioner (R. 751). These packs are discussed beginning at page 115 of the record. The details are reported in Exhibits 11 and 12 (R. 119). Both pre-steamed and raw shucked oysters were canned, and the only modification of cannery practice was an experiment with a home-made exhaust box (Ex. 11, R. 121) and in a few instances the plunger was not used.

It also appears that nine cans of the Rowe experimental pack shown on Exhibits 11-L to Q (Codes OA42, OB42 and OC42) were on hand and were opened at the hearing before the Examiner at Washington, and the drained weights determined. The results are shown at page 653 of the record.

The experimental packs show clearly that there is no difficulty under commercial practice to place in the can enough oysters that have been prepared by a reasonable method of pre-steaming so as to meet the 6½ ounce fill.⁴ This point is not seriously controverted by any evidence in the record (R. 775). There is no practical difference in the results shown by the experimental packs put up by representatives of the canners. (Exhibits 14A and 15A.)

⁴ The results show that by the use of the ordinary commercial practice and with a customary pre-steaming period an 8-ounce fill will yield a drained weight of 6½ ounces with a reasonable margin of safety.

The only suggestion that this cannot be done is in the general statement that it is impossible to meet the required fill (Br. 75).

The arguable question whether there was any substantial change in appearance or quality in the experimental packs made to meet the increased fill can be determined on a realistic basis only by comparisons of cans taken from that pack with the commercially canned product having a much lower drained weight. Comparisons both by witnesses who appeared for the Food and Drug Administration and by witnesses who appeared for the West Coast industry show that so far as appearance and taste of oysters are concerned, oysters taken from the experimental packs are essentially as satisfactory as commercially canned Pacific oysters.

The oysters packed by Mr. Reed were opened and examined at the Food and Drug Administration and the general appearance observed (R. 103). In general, all had the appearance of the ordinary Pacific canned oyster (R. 106). There was no evidence of over-filling (R. 107). No browning whatsoever was noticed. (R. 664.)

The condition of each can packed by Mr. Rowe was also observed and is noted under the heading "Appearance" on Exhibits 11A to Q. These notations disclose no discoloration in a substantial number of cans, and the balance range from slight discoloration or very slight browning to brown spots and discolored oysters at the top. The discoloration or browning was noted both in the light fills and the heavy fills (R. 122).

Samples of commercially packed Pacific and Southern oysters collected by the Food and Drug Administration were examined by Rowe (R. 125). These cans were obtained upon the open market (R. 637). The results of these examinations are shown on Exhibit 21 (R. 631). The Pacific oysters were packed to yield a drained weight of 5 ounces, and the Southern oysters to yield a drained weight of 7½ ounces. The cans of Pacific oysters were in no instance full of oysters, while the cans of small oysters were generally well filled. When the cans were not full of oysters

the oysters were replaced by liquid. The quality of the commercially packed Pacific oysters referred to on Exhibit 21 was in no way superior to that of the experimental packs on which the drained weight was 7 ounces or more (R. 125). The information on Exhibit 21 also discloses that the cans contained about one-half oyster meat and one-half liquid. A typical example is discussed at page 635 of the record. The can contained 5.33 ounces of oysters and 5.47 of liquid. Another can held 4.44 ounces of oyster meat and 5.44 of liquid. On the average those cans which disclose approximately 5½ ounces of oysters contained as much liquid as oyster meat (Exhibit 21).

The basis of the petitioner's claim that a serious impairment in quality will result when drained weights in excess of 5 ounces are used in the so-called "demerit" system which was devised by representatives of the canners for the purposes of this case. The result claimed for the system is disclosed on Exhibits 14 through 20 which tend to show quality deterioration as the pack increased from a 6½ ounce fill-in weight to a 10 ounce fill-in weight.

These exhibits, together with the oral testimony of Clough and Esveldt, were said to reveal appearance and quality deterioration due to the increased fill. Deterioration was found by the application of a system which consisted of giving demerits of various numbers for factors chosen by these witnesses. The reasons for giving the precise number of demerits in each instance were not explained, and they were of necessity arbitrarily assigned. But after exhibits 14 through 16 were offered, the evidence which was developed on cross-examination showed it impossible to relate any of the grading results as shown on the deterioration tables to any can as shown on the summary of the laboratory pack. The exhibit simply did not contain the information (R. 573).

To meet the situation, some work sheets were offered by the Pacific canners and Exhibit 19 was prepared and placed in evidence by them. For all practical purposes Exhibit 19 is a comprehensive summary of, and super-

sedes, the material in the preceding exhibits in that it contains all information in such exhibits, but is much more detailed as to each can.⁵

Exhibit 19 reveals the fallacy of the demerit system. Analysis of all the data contained in that Exhibit shows that there were no significant changes in the factors noted that could be attributed to fill. A tabulation has been made of the total number of oysters and the total drained weight of each pack as tabulated on Exhibit 19 in respect to the fill-in weights from $6\frac{1}{2}$ to $8\frac{1}{2}$ ounces. From these figures the percent of oysters and the number of oysters per ounce of drained weight which exhibited each of the characteristics has been noted. The results are summarized in charts attached to this brief as Appendices A & B. The charts show very graphically that an increase in fill from 5.4 ounces of drained weight to 6.9 ounces of drained weight did not result in a greater number of broken oysters, in additional oysters showing browning, or in more twisted oysters. The graphs show that there was a slight increase in the factor called pressure. The packs having 5.4 ounces average drained weight have 2.2% of the oysters showing pressure while the packs having an average drained weight of 6.6 ounces have 7.1% of the oysters showing "pressure." The graphs indicate a trend in the number of oysters that were twisted, as this number seemingly increases with the increased fill. The differences, however, are not statistically significant because of the large variations between the packs within each level of fill and the large amount of overlapping between the number twisted on the lower fills and the number twisted on the higher fills; for example, one pack of 7 cans of oysters with an average drained weight of $6\frac{1}{2}$ ounces had no oysters twisted, whereas a pack of 12 cans with an average drained weight of 5.4 ounces had 18% of twisted oysters.

It is conceded by a witness for the canners that the 8 experimental cans shown on the top line of Exhibit 15 with

⁵ Exhibit 19 is a summary taken from work sheets. It is in every sense comparable to Exhibit 33 to which petitioner seriously objects.

an 8-ounce fill-in weight and the average drained weight of 5.21 ounces represent good commercial practice (R. 397, 398). Yet it appears that in these 8 cans were found 3 broken oysters and 3 twisted oysters. The witness explained the situation as due to the high count of oysters. (63 oysters as shown on Exhibit 17, page 3). Other examples may be shown.⁶

There is abundant evidence in the record to sustain the finding of the Administrator to the effect that there is no significant correlation between the incidence of these so-called demerit conditions and the drained weight, when the percent of oysters showing defects is considered instead of the sum of "demerits" per can. (Finding 7, Petitioner's Appendix A, page 10.)

The authors of the demerit system frankly admitted that it is entirely new and untried and was devised by them during the course of the examination of the experimental packs without any idea of showing what the actual commercial quality of the packs might be. (R. 214.) It is conceded that the choice of the comparative scale of demerits was entirely their own (R. 241), and that the assignment of a certain number of "demerits" to a certain condition was based solely upon opinion as to their comparative value and was entirely arbitrary (R. 240). The system was not devised to show what the consumer concept of the canned oysters might be. It was not the purpose to meet a qualitative definition. Discolorations which frequently occur in canned oysters other than browning, such as liverspots, were discarded although there may be confusion in the cause of the discoloration (R. 238, 239, 684). It is said that the black area on the mantle of the Pacific oyster, far from being a discoloration or a disadvantage, is

⁶ The packs of medium size oysters shown on Exhibit 19 indicate that the percentage of broken oysters is greater at the 6½ ounce fill-in weight than at the 7½ ounce and 8 ounce fill-in weights. The percentage of broken oysters at the 8½ ounce fill-in weight appears to be only slightly more than at the 6½ ounce fill-in weight.

in fact a healthy characteristic of the oyster (R. 732).⁷ No account was taken of other factors which are considered in grading oysters from a commercial standpoint, and the system has no similarity to the grading of any other sea food (R. 273). The purpose of the experiment was to search for objectionable characteristics resulting from the increased fill of container and no attempt to correlation to commercial grade was obtained (R. 386, 395, 680). It could not be carried over into commercial grading of oysters (R. 269). The vulnerability of the test was conceded (R. 240).

Petitioner's Specifications of Errors No. 22 through 27 attack Finding 6 of the March 10 order (Br. 60-61). There appears to be no assault on Finding 17 of the supplemental order in so far as it states "Based on the number of oysters showing . . . defects, there is no real difference between canned oysters filled to yield 5 ounces of drained weight and those filled to yield 6½ ounces drained weight whether oysters were pre-steamed or blanched." Assignment 22 complains because Finding 6 omitted to show that experimental packs sponsored by canners of Pacific oysters reveals a serious impairment of quality when drained weights in excess of 5 ounces were used. As we have pointed out, a careful analysis and evaluation of the evidence offered by the canners, including their exhibits, shows that there was no significant change even in the factors which they emphasized as evidencing deterioration, with the single exception of the factor called "pressure."

This specification also complains of the finding that the number of demerits given was made on an arbitrary basis. We have pointed out that the evidence shows without dispute that the demerits assigned were arbitrarily chosen and without reference to the true quality of the pack or to the commercial acceptability of the product.

Specification 23 complains of Finding 6 in so far as it finds to the effect that browning can be eliminated by the

⁷ But see testimony of Esveltdt (R. 679-680) to the effect that the black mantle always has been a problem of the industry, affects quality, but was not taken into account in the demerit system.

removal of excess entrapped air. The finding is not in those terms. The Administrator found that browning "is related to the amount of entrapped air in the can at the time of closure. Excess entrapped air can be avoided in good manufacturing practice." This finding is supported by all of the evidence. The specification also claims that the finding erroneously suggests that liverspots are normally in Pacific oysters. The witnesses for the canners testify that liverspot discoloration and the dark mantle on Pacific oysters are among the greatest problems of the industry. (R. 163, 173, 539, 680, 732).

Specification 24 complains of Finding 6 in so far as it states that pressure marks are not unsightly. This finding has ample support in the record (R. 984, 985) and is not overcome by the contrary statement cited by the petitioner. Since there had been no cans of Pacific oysters filled to capacity, the condition called pressure naturally has not been encountered and there has been no showing that the consuming public is aware of the condition or that it would be taken into account in evaluating the canned product.⁸ There is no substantial evidence that pressure causes any substantial impairment in quality.

Specification 25 complains of Finding 6 in omitting to show that the Pacific oyster is susceptible to breakage. It is not denied that the Pacific oyster is susceptible to breakage (see Finding 2 of Definitions and Standards of Identity). Finding 6 simply is to the effect that breakage does not increase as the fill increases.

Specification 26 complains of Finding 6 in so far as it states that there is no significant correlation between the various blemishes and the drained weight of oysters. The finding is not in those terms. It states "except in the case of the condition called pressure, there is no significant correlation between the conditions" [browning, twisting, breaking, and tearing]. As we have shown, a careful evaluation of all the evidence reveals that the realistic incidence of

⁸ Dr. Clough testified (R. 247) that consumer probably would not prefer to have an oyster that was flat on one side replaced by water. Exhibit 27 notes "pressure" but does not mention it as adversely affecting quality.

these conditions does not increase as the fill increases and that oysters can be filled to yield a cut-out weight of at least 6½ ounces without significant impairment of the quality of the oysters.

Specification 27 complains that Finding 6 failed to take into account the affidavits offered by petitioner as Exhibits 28, 29 and 30. Since those exhibits were not in the record when Finding 6 was made, it is logical enough that they were not taken into consideration. However, the exhibits were fully considered before the supplemental findings were made. The Consumers Acceptance Test involved the sampling of oyster stew and fried oysters prepared from three brands of canned oysters, blanched and pre-steamed Pacific oysters from 5-ounce packs, and Southern oysters from a 7½-ounce pack. No Pacific oysters with increased drained weight were involved. While the comparative quality of oyster stew and fried oysters prepared from the different commercial packs may be a legitimate competitive factor in the industry, it fails to cast any light on the effects of the increased fill of container and is wholly immaterial to the inquiry.

The finding referred to in Specification 28 refers to raw oysters and not pre-steamed or blanched oysters.

Specifications 33 and 46 complain of a failure to find that the liquid from blanched oysters has a significant food value.⁹ It is an admitted fact that the consumer prefers the oyster. (R. 447, 447a.) After all it is the oysters rather than the liquid that the consumer buys and for which the standard is being fixed.

Specifications 43, 44 and 49 complain because the standard will require a larger fill-in weight of Pacific oysters and permit a smaller fill-in weight for eastern oysters with a corresponding increase in the amount of added liquid. The net result in either case is that the consumer will get the same amount of "oysters."

The evidence at the first hearing included testimony and exhibits with respect to (a) canned oysters packed after pre-steaming and (b) canned oysters prepared from raw

⁹ See Findings 6 (Identity) and 15 (Fill).

shucked oysters without prior heat treatment. The Administrator concluded, upon consideration and careful evaluation of all of the evidence, that the 6½-ounce fill of container requirement was reasonably calculated to promote honesty and fair dealing in the interest of consumers and could be met without quality impairment of the canned product. On application of the petitioner, the Court ordered the proceeding remanded for the receipt of such evidence as the petitioner might produce.

We previously have pointed out that petitioner presented at the second hearing no container studies made on its own behalf. Exhibit 27 included an evaluation by Dr. Clough¹⁰ and Mr. Willet. This exhibit grades the canned oysters according to the demerit system which the Administrator found not reasonably related to trade or consumer concepts of quality. The exhibit makes no comparison of the 6½-ounce fill canned product with the commercially produced food. It, therefore, does not show that increasing the fill to 6½ ounces drained weight results in quality or appearance deterioration.

The day after the remand by this Court the Food and Drug Administration set to work to get the necessary factual evidence to show whether the 6½-ounce fill could reasonably be met with the new blanching process. The Administration's representative went to the petitioner's plant first. The inspector was not permitted to make the necessary packs there at that time. He carefully observed the blanching process in use. An average put-in weight of 7.42 ounces was being used. The cans appeared to be slack filled. Twelve cans of labeled stock were obtained and sent to the Food and Drug Administration. (R. 854-855, 858). The representative then proceeded to the cannery of the Northern Oyster Company, Oysterville, Washington (R. 859). That company was using the blanching process developed by petitioner (R. 859), and the inspector was allowed to prepare an experimental pack. The details are discussed beginning on page 860. The packers encountered

¹⁰ Dr. Clough (R. 675) stated that he was not familiar with commercial quality of canned oysters.

no difficulty in making the necessary put-in weight (R. 861), and the packs were made without change in the regular cannery practice except for the addition of extra oysters in the cans. A sample of the 5-ounce commercial pack was taken at the same time (R. 862, 863). At the time of preparation of the experimental pack, data was obtained to show the loss in liquid and solids that occurred during blanching (R. 863).

On June 11 an experimental pack was made under commercial conditions at the E. H. Bendiksen plant at Ocean Park, Washington. The details are reported at page 863 of the record. Loss during blanching was determined (R. 866). The pack was made without difficulty (R. 866). For comparative purposes, one case of the company's commercial blanched canned oysters and one case of commercial pre-steamed canned oysters were taken (R. 867). Certain chemical determinations were made in the Seattle laboratories of the Food and Drug Administration (R. 868).

Finally, on June 16 arrangements were made for the production of an experimental pack in the petitioner's cannery (R. 868-869). The record (R. 869) includes the details of this pack. Weighings before and after blanching showed a 14% loss in weight during the blanching process (R. 870). The packer encountered no difficulty in making the necessary weights, and the cans went through the process without incident (R. 870, 1120). For comparative purposes, one case of the regular commercial pack was taken from the same retort tray (R. 872), and another sample of the five ounce commercial production was taken. Chemical determinations were made in Seattle (R. 875).

All of the plants were using a put-in weight of $7\frac{1}{4}$ ounces. A put-in weight of $9\frac{3}{4}$ ounces was used for the experimental pack. Otherwise, the regular plant method used at each plant was followed and in each case the procedure followed was as near as could be to that used at the petitioner's plant. No changes in equipment were required (R. 859-876). The packing of the oysters at the put-in weight of $9\frac{3}{4}$ ounces was accomplished in accordance with

the usual methods by the employees of the plants without any difficulty (R. 859, 861, 866, 869, 870, 871). A 12-can sample of each of the experimental packs was sent to the Food and Drug Administration, together with samples of the regular commercial pack from each of the plants.

The inspector then selected one sample of five ounces pre-steamed canned oysters (Bendiksen), one sample of five ounce blanched canned oysters (Willapoint), and one sample of 6½ ounce blanched canned oysters for display to purchasers (R. 877-879). The buyers, with one exception, preferred the pre-steamed oysters (R. 879). They saw no deterioration in quality attributable to the increased fill (R. 880-881).

The samples put up and collected by the inspector at the plants referred to, together with his report showing the manner by which the samples were obtained, were received by the Food and Drug Administration and the samples examined as to odor, taste, and appearance, by Mr. Callo-way, Mr. Rowe, and by three chemists employed in the Food Division (R. 799). Nine cans of each sample were examined to determine the drained weight, the weight of the liquid in the can and the number of oysters in each can. The characteristics, such as browning and the number of twisted and broken oysters were noted (R. 808, 809, 814, 821, 822). Three cans of each sample were chemically examined to determine the contents of solids, ash, salt and protein. The results of these examinations, together with the report received from the inspector as to the put-in weights are shown on Exhibit 33 (R. 799-816).¹¹ Mr. Callo-way testified as to the details of the examinations. The other participants in the examination, however, were present at the hearing and were placed upon the stand for

¹¹ Exhibit 33 discloses the results of the examination of the experimental packs put up by Mr. Hansen at the following plants: Northern Oyster Co., F. S. No. 79-118-H. E. H. Bendiksen Co., F. S. No. 79-119-H. Willapoint Oyster Inc., F. S. No. 79-144-H. Also the results of the Examination of the regular commercial packs obtained by Mr. Hansen as follows: E. H. Bendiksen Co., F. S. 79-120-H. Northern Oyster Co., F. S. 79-141-H. Willapoint Oysters, Inc., F. S. 79-142-H and F. S. 79-145-H.

cross-examination by Mr. Stephan. He chose not to ask any questions as to the details of the examinations. The only objection to the exhibit was that the original records were not present (R. 817). The record shows, page 858, that all such original records were made available to counsel for petitioner for cross-examination.

As shown on Exhibit 33, the conclusions of the chemists who examined the packs were that the high fill did not result in any significant increase in broken oysters, twisted oysters, or browned oysters (R. 821-822, 824-825, 829). Both by chemical analysis and by organoleptic examination, the blanched oysters were determined to be for practical purposes indistinguishable from oysters prepared from the pre-steaming method (R. 800, 802, 824-825, 829-831). The blanched oysters packed to cutout weights well above 6½ ounces were indistinguishable from presteamed oysters in odor, taste, and appearance. The liquid portion of the blanched canned oysters was less attractive (R. 800). Cans filled to yield only five ounces of oyster meat were slack-filled (R. 803, 854, Ex. 32). When the liquid was removed, the oysters occupied only a little more than one-half of the space in the cans (R. 806, 808, Ex. 32).

The record shows that blanching as ordinarily practiced has essentially the same effect on oysters as does pre-steaming (R. 827-828). In both processes the oysters are partially cooked and some liquid is lost. An additional amount of liquid is added in both processes. The consumer gets a product which is indistinguishable as far as the oysters are concerned. When the put-in weight is sufficient to yield a drained weight of 6½ ounces, the water added amounts to from 1½ to 2 ounces. When 7½ ounces are put in the can to yield a drained weight of 5 ounces, about 3½ ounces of water are added to the can. When less water is added there is a slightly higher concentration of solids and the liquid has a stronger taste (R. 829-831). The liquid taken from cans prepared by either method is approximately the same in solids and ash (R. 823) even though a slight amount more liquid occurs in cans pre-

pared from blanched oysters. The principal element of food value in the liquid is glycogen (R. 827-828).¹²

Statistical analysis of the data compiled on Exhibit 33 is graphically set forth in Appendices C and D.

This shows a comparison of the cans filled to yield 5 ounces with cans filled to yield 6½ ounces and reveals that there was no significant difference in the occurrence of broken oysters, browned oysters or twisted oysters nor in the number of oysters showing pressure.

Two cans of each sample were cut, the liquid drained and the cans photographed. These photographs are in evidence as Exhibit 32 and graphically reflect the fill of the cans. Cans not photographed were substantially identical.¹³ The examination disclosed that the experimental packs had several cans with drained weights over 7 ounces, and that for practical purposes 6½ ounces is a reasonable well filled can but is not filled to capacity (R. 831-832).

A comparison may be made between commercial packs of blanched and pre-steamed oysters and between the commercial packs and the experimental packs. At the Bendiksen plant, the liquid in the cans is very carefully controlled and was at a high level. Very little browning is shown in any of the cans. The weight of the liquid in the cans of both commercial packs exceeded the weight of the oysters. The chemical analysis of the two commercial samples discloses that the liquid and the oysters contain practically the same proportion of solids (822, 823). It was found that the loss of weight of oysters during the blanching process ranged from 17.2 per cent at the Bendiksen plant to 14 percent at petitioner's plant. This demon-

¹² The commercial packs of blanched oysters shown on Exhibit 33 disclose that the average amount of liquid per can is more than the average drained weight of the oysters.

¹³ The origin of the cans represented by Exhibit 32 may be determined by the code numbers shown on the lid of each can in the photograph. Code number 79118 H, 79119 H and 79144 H represent the experimental packs with drained weights calculated at 6½ ounces. The others represent commercial packs with drained weights calculated to yield 5 ounces.

strates that blanching has essentially the same effect as pre-steaming, which is further verified by an examination of the brine used for the blanching (R. 825, 826).

The petitioner, as we have pointed out, does not challenge the essentials of Finding 17 of the supplemental order. Instead, Willapoint attacks the entire order claiming that it is void because the Acting Administrator placed reliance upon Exhibit 33 (Br. 100). The petitioner argues (1) that Exhibit 33 is unworthy of credit because it is entirely inconsistent with Exhibit 27 offered by petitioner, the greatest inconsistency being in reports of the element of browning (Br. 97-98); (2) that cross-examination of Mr. Callaway as to another pack developed inconsistencies which cast grave doubt upon the trustworthiness of Exhibit 33 (Br. 98-99); and (3) that the work sheets underlying Exhibit 33 reveal that the exhibit is "honey-combed with error" (Br. 96). Petitioner asserts that Exhibit 33 should have been rejected in the absence of work sheets.

The simplest answer, perhaps, to all such argument is that it goes to the weight of the evidence and not to its admissibility. And it was for the Administrator to resolve any conflicts in the evidence and to decide whether the testimony of witnesses who appeared at the hearing should be believed. *Land o'Lakes Creameries v. McNutt*, 132 F. (2d) 653, 658 (C. C. A. 8); *National Labor Relations Board v. Reeves Rubber Co.*, 153 F. (2d) 340, 342 (C. C. A. 9).

The alleged inconsistency with the testimony of Dr. Clough is certainly not sufficient to negative the entire examination made by several witnesses in the Food and Drug Administration. Dr. Clough's evidence appears in Exhibit 27, which is an affidavit reporting joint results by Dr. Clough and Mr. Willett. Dr. Clough stated that he was not familiar with the commercial aspects of quality of canned oysters (R. 675). Dr. Clough made no comparisons as between the cans filled to yield 6½ ounces and the regular commercial products. Insofar as the record shows, the deficiencies noted by Dr. Clough and

Mr. Willett in Exhibit 27 occurred with equal frequency in the products of commercial manufacture collected at the same time the experimental packs were made.

The petitioner attempts to make much of alleged inconsistencies in the testimony of Mr. Callaway as to a pack of oysters made at the cannery of the Northern Oyster Company (Br. 98-100). It complains that the findings failed to mention inconsistencies developed on cross-examination (Specification 42; Br. 65-66). Again, we should say that the complaint goes to the weight of the evidence and the credibility of the witness. However, no essential inconsistencies in the testimony were developed on cross-examination. During the course of his lengthy cross-examination, petitioner's counsel developed nothing of more significance than that Exhibit 33, prepared under Mr. Callaway's direction, reported the word "oysters" rather than "oyster", and that the words "no defects noted" were reported rather than "OK" or "OK picture" which appeared on the work sheets (R. 925-934, 938, 944, 998). In any event, these apparent discrepancies were fully developed and a complete explanation made before the record reached the Acting Administrator. He evaluated the evidence after the petitioner's points were made.

There was certainly no unfairness in restricting the cross-examination. The presiding officer was unusually lenient in permitting Mr. Stephan to follow lines of interrogation that had no purpose other than to cast confusion and misunderstanding into the record.

Petitioner argues that the work sheets underlying Exhibit 33 reveal that the exhibit is "honey combed with error", and it asserts that the exhibit should have been rejected in the absence of the work sheets.

So that there will be no misunderstanding, the so-called work sheets were the papers used in the laboratory to record the information originally. The material then was transposed to Exhibit 33. This exhibit was called a master sheet by the witness, but it is exactly the same in kind as Exhibit 19 which Pacific canners designated as a work sheet. The so-called work sheets made in the laboratory

were made available to counsel, and he was permitted to use them throughout his cross-examination (R. 1000). Nevertheless, he claims that the order should be set aside because the laboratory work sheets were not put in evidence. We respectfully submit that no prejudice to petitioner has been shown by reason of the refusal to admit the work sheets in evidence.

In addition to the work sheets, petitioner was given ample opportunity to cross-examine each of the chemists who participated in the examination and evaluation of the cans of oysters (R. 1011, 1013, 1015). He chose not to examine those participants. Rather, he sought to leave in the record an inference that the men were underlings subject to the will of Mr. Callaway (R. 952-953). There is no support for such inference and the only logical reason for petitioner's failure to examine the witnesses is that counsel knew that their evidence would strongly corroborate that of the witness Callaway.

If needed, there is further corroboration of Mr. Callaway's evidence in the detailed chemical results reported, and in the evaluation of the packs by large scale buyers.

Another argument, along the same lines, is that the examinations reported in Exhibit 33 are without weight because the method of examination used was faulty (Br. 105-107). The contention is that an organoleptic examination cannot be used unless made in the manner suggested in *McGraw-Hill Series in Food Technology, Flavor* (1945), Ch. 11, p. 98.

Simply to state the proposition is to refute it. The witness explained why he considered the technique there employed as inapplicable to this test (R. 890-899). The principal objection seems to be that each participant failed to record, secretly and separately, his evaluation made by organoleptic means (Br. 106-107).

There is, of course, no support in the record for the wild statement that a casual and random study was made. The very unfairness of the charge is revealed in the quotations and pages cited by petitioner in his brief. While the witness stated honestly that the different participants

may have skipped around and that no regular sequence was followed, he testified also that the opened cans and trays of oysters were so arranged on the table as to maintain identity (R. 892) and that there was no mixing up of cans or dishes (R. 896). The witnesses could not testify precisely what the other participants did (Br. 106), but the participants were available to give that testimony if it were desired. Petitioner quotes from Mr. Callaway to leave the implication that the test was faulty in that the participants failed to rinse their mouths between samplings (Br. 106). The quotation is as follows, and we have italicized the part which petitioner leaves out:

I will be glad to add in any number of cases it is customary to wash the mouth out between tasting, where there is a very strong tasting material involved which tends to kill the taste.

That is not the case with oysters, and it was not necessary to wash out the mouth between the tastes.

Petitioner conveniently ignores the fact that two of its quality evaluations were made without separate recording of results, detailed data on work sheets separately recorded, and with the alleged possibility that one participant might influence the decision of the other. Mr. Bailey testified that the blanching process was developed upon the basis of quality evaluation made by himself and his plant superintendent, Lynn Hayes (R. 770). Exhibit 27 shows joint results reported by Dr. Clough and Mr. Willett. No separate observations were recorded.

Petitioner seeks to bolster this point of its argument by reference to Exhibit 28 (Br. 107-110), which it asserts was totally ignored. The exhibit was specifically mentioned in Finding 15, and the order clearly recites that the findings were made upon the basis of the evidence of record.

But Exhibit 28 does not prove, by any stretch of the imagination, that petitioner's blanched oysters are better in quality than would be the same oysters canned after pre-steaming. No such comparison was made. The comparison was between the pre-steamed oysters of another Pacific packer, the pre-steamed oysters of a Southern

canner, and the commercially canned product of Willapa point. The comparison was made after the foods had been cooked as oyster stew and as fried oysters. At its very best, the exhibit simply shows that there were slight differences in the appearance, texture, and flavor of the three products. Taken at its best, it shows nothing more than a conflict in the evidence. There is no rule of law that a conflict of that kind requires the Administrator to take the affidavit to the exclusion of other competent and convincing evidence. Certainly, the order is not voided because the exhibit was not given controlling weight, and there is no basis for the claim that the evidence was ignored when the findings show affirmatively that the exhibit was considered.

Petitioner attempts to make it appear that the methods of canning Gulf oysters and Pacific oysters are so radically different as to require separate standards of fill of container (Specifications 7-8, Br. 55-56). This has no support in the record. The basic method of canning is the same, and variations in the amount or manner of treatment before placement in the cans do not change the essentials. The food is a cooked product which has lost part of its liquids by heat treatment.

Petitioner complains (Spec. 43, 44, and 48; Br. 66, 68) that Finding 12 is not supported by substantial evidence insofar as it states that the $7\frac{1}{2}$ ounce put-in weight necessary to achieve a 5-ounce cut-out weight for canned Pacific oysters permits a canner to replace 2 ounces of blanched oysters with two ounces of water. The complaint is that

“with studied design it ignores the fact that the order outstanding would require petitioner to put 9 ounces of oysters into its can and $1\frac{1}{2}$ ounces of water to yield a drained weight of $6\frac{1}{2}$ ounces . . . whereas under the existing order with respect to steam-opened Southern oysters, Southern producers are permitted to reduce the amount put into the can from . . . $7\frac{1}{2}$ ounces to a new standard of $6\frac{1}{2}$ ounces of oysters, and to increase the amount of water added to the can from 3 ounces previously authorized to 4 ounces” (Br. 66).

The findings explain in considerable detail that the difference in put-in weight is without significance to the consumer. The Acting Administrator found that the put-in weight of oysters, because of variable losses which occur in the can during processing, is not an accurate measure of fill of container for canned oysters, but would be if all oysters were pre-cooked to the same degree before weighing into the cans (Finding 14). Findings 10-13 explain that the total amount of liquid separating from oysters is approximately the same regardless of the processing method used. In the case of blanching and pre-steaming, part of the loss occurs before the oysters are placed in the cans and the remainder of the separation takes place in the can when it is processed. The pre-can loss is approximately the same with blanching as practiced by Willapa point and with the ideal light pre-steaming employed by other Pacific oyster canners. When oysters of any type are heavily pre-steamed or heavily blanched, there is little loss of liquid during processing (R. 877, 1143) and cut-out weight approximates put-in weight.

The Pacific oyster is larger in size, and the pre-steaming that is necessary to cause the shells to open causes a loss of liquid that approximates 16%. The remainder of the loss occurs in the can. Blanching, as practiced by Willapa point has the same effect (Ex. 33).¹⁴

So far as the consumer is concerned, the loss prior to canning is of no consequence. Regardless of the heat treatment given, or the lack of such treatment, the amount of oysters in the can when it is opened is the important consideration. The consumer in either event gets 6½ ounces of oysters and the remainder of the can contains liquid. The difference is that all of the liquid is driven

¹⁴ Petitioner insists that the blanching loss is approximately 3%, and it cites in this respect Exhibit 28 (more specifically Appendix "A" of that exhibit). These figures conflict with the results obtained by the Food and Drug Administration. A possible explanation could be found in the fact that Exhibit 28 reports in terms of "volume." But Mr. Bailey explained that the result was obtained by weighing the oysters before and after blanching (R. 792), which was the same method used by Inspector Hansen (R. 863, 866, 870). See Assignment 40, Br. 65.

out of the Southern oysters during pre-steaming and they suffer no loss in the cans, whereas the blanched Pacific oysters (and pre-steamed Pacific oysters) have lost only part of their liquid before going into the cans and lose the remainder in the cans. The Administrator concluded, and properly so, that competing canned oysters packed in the same sized can but filled to yield different amounts of oyster meat is a condition likely to result in deception and confusion of consumers.

Petitioner, however, attempts to justify the 5-ounce fill by stating that the liquid portion of the canned oysters has significant food value. The findings recognize this fact (Finding 15)¹⁵ but also recognize that the liquid is of much less value to the consumer than is the oyster meat. Whatever food value the liquid has, the product contains more of it if less water and more oysters are put into the cans (Finding 18).

Petitioner argues that the food value of the liquid in its product is superior. Its own Exhibit 29 compares the food value of the liquid from its commercial product with that drained from a can of Southern oysters. The difference, by that analysis, is .85% in protein and 3.68% in solids. But in terms of ounces, the protein difference is seven hundredths of an ounce; and the solids difference is twenty-eight hundredths of an ounce. The percent of protein in the oyster meat is approximately 17% as against approximately 2.5% in the liquid (Ex. 33). So the meat is much to be preferred if food value is the test to be applied.

¹⁵ Petitioner insists that the Administrator erred in failing to find and conclude that the packing medium of its product has flavor and food value (Specifications 17, 33, 46, 49; Br. 58, 62, 67, 68). Finding 6 of the March 10 order states that the liquid has an oyster taste and is useful in making oyster stews, but is usually discarded if oysters are used for frying, although it may be used for food in some other way. This is supported by Exhibit 28, of which Petitioner makes much. Findings 15 and 18 of the supplemental order discuss the food value and flavor of the liquid packing medium.

3. The Increased Fill Does Not Result in Poor Quality Due to Excess Clipping at the Closing Machine.

There was no point made at the first hearing to show that the increased fill would result in poor quality due to excessive clipping of oysters at the closing machine.

That point was introduced at the second hearing by a representative of E. H. Bendiksen & Company (Ex. 37). The Acting Administrator found (Finding 16);

Sometimes a portion of the top oyster is clipped off by the sealing operation. This frequently occurs with a fill designed to yield 5 ounces drained weight but the relative incidence of clipping between a fill designed to yield 5 ounces and one devised to yield $6\frac{1}{2}$ ounces is not shown by the record.

Petitioner claims, as usual, that a vital exhibit was ignored (Specification 47, Br. 67) which shows waste and destruction of oysters due to an excessive $6\frac{1}{2}$ ounce fill. The record references cited for the finding show that the point was not ignored.

The testimony of Mr. Bailey is particularly pertinent on this issue, and shows an opportunistic change of testimony in an attempt to convince the Administrator that the order is not reasonable.

Mr. Bailey said (R. 786):

An oyster, being heavier than the brine, naturally settles; but with our $7\frac{1}{4}$ to 8 oz. fill in weight, our oysters protrude above the top of the can to the extent that *quite a high proportion of the cans have a portion of the oyster cut off* as it goes through the closing machine. In other words they are so full, they will have a gill possibly hanging over the edge of the can. (Emphasis added.)

The purpose of that testimony was to lead the Administrator to believe that the $6\frac{1}{2}$ ounce fill just could not be met—that with the 5 ounce fill the cans are filled to capacity.

But after Mr. Steele introduced Exhibit 37, the witness said (R. 1159):

Q. Mr. Bailey, have you observed clipping of the type indicated by Ex. 37, using the 5 oz. fill?

A. Yes sir. You get a clipped mantle every once in a while.

Q. Do you grade those noted to be clipped as sub-standard and sell it as junked oysters?

A. It is too late. It is already sealed and it is on its way; there is not anything you can do about it.

Q. You sell without differentiation of the quality?

A. You have to do that, it is in the can sealed, and on its way, *and it is very rare* I will say, that *with a 5 oz. fill that occurs.* (Emphasis added.)

The finding made by the Administrator has ample support, including testimony that experimental packs which yielded 7 ounces of oysters were made in Willapoint's plant on June 16 without difficulty (R. 869, 1120) and none were clipped or injured (R. 870).

Section 401(f)(1) of the Act provides that "The findings of the Administrator as to the facts, if supported by substantial evidence, shall be conclusive." Under such provision, common in many statutes, such as § 10 (e) of the National Labor Relations Act, 29 U. S. C. 160 (e), the review court is not burdened with the task of considering, and it is not its function to consider the weight of the evidence to ascertain whether it preponderates in favor of the findings. As this court said in *National Labor Relations Board v. Reeves Rubber Company*, 153 F. (2d) 340, 342:

"It would serve no purpose to collate the unbroken line of expressions by the Supreme Court of the United States and every one of the United States Circuit Courts of Appeals, including this circuit, that the Labor Board tries the facts and the reviewing court goes into facts only to find whether or not, as a matter of law, there is substance to the evidence upon which the Board has made its findings."

Much of the evidence in this case consists of controlled numerical count. The results speak for themselves. The remaining testimony relates to the opinions and conclusions of the witnesses as to the appearance of the oysters.

The witnesses from the Food and Drug Administration, shown to have had years of experience in problems of the nature involved in this case, testified that upon organoleptic examination of the oysters from different fills and prepared from different methods, no substantial difference in the appearance of the oysters was shown and that there was no substantial impairment of the quality of the product by reason of the increased fill. This evidence is competent, relevant and sufficient, if believed, to support the Administrator's order. The opinions of these men cannot be characterized as improbable, beyond belief, or inconsistent. Because the opinions of these experienced men and their conclusions may conflict with the opinions of the canners, does not warrant this court in substituting its judgment for that of the Administrator.

B.

The Standards Fixed are Reasonable and are Within the Scope of the Authority of the Administrator.

The test of reasonableness must be applied in the light of the provisions of the Act and its purpose. *Federal Security Administrator v. Quaker Oats Co.*, 318 U. S. 218. Section 401 of the Act (21 U. S. C. 341) places the duty upon the Administrator to fix a reasonable definition and standard of identity for food under its common or usual name as far as practicable and to fix a reasonable standard of fill of container, whenever in the judgment of the Administrator such action will promote honesty and fair dealing in the interest of consumers. It needs no argument to establish that the purpose of the provision in the law in relation to the standard of fill of container is to protect the consumer against a slack filled container. It is axiomatic to say that a reasonably filled container will promote honesty and fair dealing in the interest of the consumer and that a slack filled container will not. All of the evidence supports the conclusion that a No. 1 E.O. can containing 5 ounces is slack filled because it is approximately half filled with oysters. The petitioner

has sought to meet this situation by attempting to show that the liquid in its can is wholesome and has food value; therefore it should be permitted to market a canned product under the name of Pacific Oysters which is half liquid and half oyster and the 5-ounce fill should not be disturbed. The Administrator determined, in effect, that a standard of fill for canned oysters should contain as much oyster meat as could reasonably be placed in its can, irrespective of the method used in preparing the oysters for canning. In testing the validity of this conclusion the issue cannot be whether the petitioner's product, including the liquid, is a good wholesome product but must be limited to the inquiry whether the particular conclusion which the Administrator reached, to achieve the object and purpose of the statute, is one which a rational person could have chosen.

Consequently, the conclusion of the Administrator should not be disturbed unless it can be said that such conclusion is so unrelated to the authority delegated as to result in an irrational and arbitrary exercise of the delegated power. *Federal Security Administrator v. Quaker Oats Co., supra*. In that case, the Court, in considering the review provisions of the Act, said:

The review provisions were patterned after those which Congress has provided for the review of "quasi-judicial" orders of the Federal Trade Commission and other agencies, which we have many times had occasion to construe. Under such provisions we have repeatedly emphasized the scope that must be allowed to the discretion and informed judgment of an expert administrative body. * * * These considerations are especially appropriate where the review is of regulations of general application adopted by an administrative agency under its rule-making power in carrying out the policy of a statute with whose enforcement it is charged. * * * Section 401 calls for the exercise of the "judgment of the Administrator." That judgment, if based on substantial evidence of record, and if within statutory and constitutional limitations, is controlling, even though the reviewing court might

on the same record have arrived at a different conclusion.

* * * * *

Since the definition of identity of a vitamin-treated food, marketed under its common or usual name, involves the inclusion of some vitamin ingredients and the exclusion of others, the Administrator necessarily has a large range of choice in determining what may be included and what excluded. It is not necessarily a valid objection to his choice that another could reasonably have been made. The judicial is not to be substituted for the legislative judgment. It is enough that the Administrator has acted within the statutory bounds of his authority, and that his choice among possible alternative standards adapted to the statutory end is one which a rational person could have made * * *.

See also *Gray v. Powell*, 314 U. S. 402; *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111; *Shields v. Utah Idaho Railroad Co.*, 305 U. S. 177; *South Chicago Coal and Dock Co. v. Bassett*, 309 U. S. 251; *Rochester Telephone Corp. v. United States*, 307 U. S. 125.

Generally, it is held that the conclusion of the administrative official will be overthrown only if it is so wanting in logic that judges can say it lacks all cogency, *Perkins v. Endicott Johnson Corporation*, 128 F. (2d) 208, 222 (CCA 2), aff'd 317 U. S. 501; that it is not the proper function of the court to say whether it would have made the same findings, or whether on the basis of such findings it would have deemed it wise to make the order entered by the Administrator (*Sperry Gyroscope Co. v. National Labor Relations Board*, 129 F. (2d) 922 (CCA 2)); that if the record contains substantial evidence in support of the administrative findings, the findings are conclusive on the court even if the record also contains substantial evidence which would have supported an inconsistent finding. (*National Labor Relations Board v. Nevada Consolidated Copper Corp.*, 316 U. S. 105); and that the weighing of facts against the background of what is necessary for protection is within the exclusive province of the

administrator provided there is a rational basis (*Hartford Gas Co. v. Security & Exchange Commission*, 129 F. (2d) 794-96 (CCA 2)).¹⁶

We have shown that the findings of the Administrator are supported by substantial evidence. He was under the duty to fix standards which would promote honesty and fair dealing in the interest of consumers. The conclusion of the decisions cited is that where the findings are supported by substantial evidence, the conclusion of the administrative tribunal in adopting the facts to the statutory end must be sustained when there is found to be a rational basis therefor. *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 146; *Shields v. Utah Idaho Railroad Co.*, 305 U. S. 177; *Federal Security Administrator v. Quaker Oats Company*, 318 U. S. 218. We submit that the test has been met, and that the choice of the Administrator is valid. The standards being otherwise reasonable and within the statutory authority, it would be immaterial even if petitioner were required thereby to change his methods or his product or even if his product was driven from the market. Cf. *Mugler v. Kansas*, 123 U. S. 623; 628-633; *Powell v. Pennsylvania*, 127 U. S. 678, 683-684; *Hebe Co. v. Shaw*, 248 U. S. 297, 302-303; *United States v. Carolene Products Co.*, 304 U. S. 144, 151.

¹⁶ In reviewing discretionary action of administrative agencies, "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Rochester Telephone Corporation v. United States*, 307 U. S. 125, 145-146. See also *Power Commission v. Pipeline Company*, 315 U. S. 575, 586. The question is not whether some better regulation might have been devised but whether the particular regulation is arbitrary, capricious or palpably wrong. *Railroad Commission v. Rowan and Nichols Oil Co.*, 311 U. S. 614, 615; *Public Service Commissioners v. Havemeyer*, 296 U. S. 506, 518; *Pacific States Box Co. v. White*, 296 U. S. 176, 185-186. The courts will not substitute their own judgment for that of the administrative agency on the wisdom or expediency of a determination within its jurisdiction. *National Labor Relations Board v. Link Belt Company*, 311 U. S. 584, 596-597; *Gray v. Powell*, 314 U. S. 402, 412; *Swayne & Hoyt v. United States*, 300 U. S. 297, 304.

C.

The Orders Were Made in Careful Observance of Procedural Safeguards Provided by Law.

The third major contention made by petitioner is that the administrative process was infected by procedural errors which invalidate the orders. The points most strenuously argued are (1) that neither respondent "conscientiously read or considered all of the evidence"; (2) that a witness for the Food and Drug Administration and its counsel either wrote or had a hand in preparing the order of March 10; and (3) that erroneous rulings upon evidence were made by the hearing examiner.

Subsidiary contentions are (1) that the notice of hearing was inadequate; (2) that the conduct of the proceedings was not fair; and (3) that the hearing examiner put an unlawful burden of proof upon petitioner at the hearing held after remand by the Court.

1. Respondents Conscientiously Considered the Evidence of Record, and Recitations to That Effect in the Orders are Not Overcome by Inferential Arguments.

The order of March 10 was made by respondent Ewing. The order recites that it was made "on the basis of the evidence received at the above entitled hearing duly held pursuant to notice." Two of the conclusions recite that they were made "on the basis of the evidence of record and the foregoing findings of fact and conclusions". Each finding was followed by references to the testimony and exhibits, and the order explained:

"The citations following each finding of fact refer to the pages of the transcript of the testimony and the exhibits received in evidence at the hearing, which are the basis for these findings."

In addition, respondent Ewing wrote to Mr. Steele, Mr. Mitchell, and Mr. Stephan, each of whom represented petitioner at the time, at different stages in the proceeding advising them that he had personally read the record and considered the issues. To Grosseup, Ambler and Stephan, Esqs., on May 25, 1948, Mr. Ewing wrote:

“After personally studying the record of hearing, I am convinced that the findings of fact and the standards provided in the final order are based upon good and substantial evidence, and that the conduct of the hearing and the rulings made by the presiding officer were fair and correct.”

The record shows very clearly that Mr. Ewing personally studied the record, and the order of March 10 changed the terms of the tentative order to reflect the issues completely. The court will notice that findings 6, 7, and 8 under standard of fill in the March 10 order differ from the tentative order. The record shows that rulings were made on all of the exceptions filed, and shows that the Administrator personally considered the petition filed on behalf of Willapoint Oysters, Inc., by Mr. Hugh B. Mitchell, its counsel. Mr. Mitchell personally discussed his petition with the Administrator before it was denied, and Mr. Ewing was well informed on the issues before him. It is an exaggeration and an untruth to assert that he failed to consider the evidence presented on petitioner's behalf.

The petitioner does not seriously contend that Mr. Ewing failed in this respect, but nevertheless asserts (Br. 77) that “neither of the respondents conscientiously read and considered all of the evidence.”

It is, of course, settled law that affirmative recitations in the orders which show official regularity can hardly be overcome by mere implicational arguments or by allegations made without a basis in fact. *National Labor Relations Board v. Biles Coleman Lumber Co.*, 98 F. (2d) 16 (C. C. A. 9); *Twin City Milk Producers Ass'n v. McNutt*, 122 F. (2d) 564, 569 (C. C. A. 8).

The real heart of the contention is that the supplemental order was made by the Acting Administrator Kingsley, and that there is no recitation that he read and considered not only the evidence taken on the remand but also all of the evidence that had been carefully studied by his superior, Administrator Ewing (Br. 45-46, 76-78). The argument is that the recitation in the order of August 3,

that the said supplemental order was made “on the basis of evidence of record”, is incorrect and cannot stand (Br. 62).

The facts shown by the record are that respondent Kingsley based his supplemental order on the evidence taken at the hearing on the remand, and so certified; and that he referred to the earlier record where necessary to make comparisons in his findings of fact. The findings made by Mr. Kingsley did not change any finding that previously had been made—they were supplemental findings which were consistent with the findings already made by Mr. Ewing.

It is important to remember that the proceedings on the remand were to be conducted within the statutory bounds of Section 701(f)(2), 21 U. S. C. 371(f)(2). The statute provides:

If the petitioner applies to the court for leave to adduce additional evidence . . . the court may order *such additional evidence* (and evidence in rebuttal thereof) to be taken before the Administrator, and to be adduced upon the hearing, in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings . . . or make new findings, *by reason of the additional evidence so taken* . . . (Emphasis added).

The Court’s order was that the proceeding be remanded to the Administrator

“with direction to take such additional evidence (and evidence in rebuttal thereof) as may be offered relative to said process of packing blanched oysters, within a period of 30 days from the date of this Order on such reasonable notice to the petitioner as he may give.”

IT IS FURTHER ORDERED that the Administrator, *after considering said evidence*, may modify his findings as to the facts, or make new findings by reason of the additional evidence so taken . . . (Emphasis added).

It seems entirely clear from the statute and the Court's order that the Administrator was not required to re-hear the entire case on the remand. Evidence was to be taken and findings made upon a narrow issue, i.e., as to the alleged new method of preparing oysters for canning and as to the relationship of such method to a reasonable standard of fill of container for canned oysters.

Petitioner asserts that, because of the absence of Administrator Ewing, the Acting Administrator could reach a decision on the additional evidence only after having studied the evidence that was the basis for the original order. In this, it relies entirely upon the first *Morgan* case. *Morgan v. United States*, 298 U. S. 468 (1936).

It should be noted that both the first *Morgan* case and the second *Morgan* case, 304 U. S. 1, are based upon a failure to observe procedural due process in a quasi-judicial proceeding. Therefore, the decision is of no applicability in administrative rule-making. *Pacific States Box & Basket Co. v. White*, 296 U. S. 176. Even so, it cannot be said, upon a fair reading of the *Morgan* decisions, that the Acting Administrator was required personally to review the matters that had been decided by Mr. Ewing before he could find the facts that were shown by the additional evidence.

The *Morgan* cases, and the decisions that have followed them, hold that the head of an administrative agency may utilize the work of assistants in sifting and analyzing the evidence. There is no requirement that he personally read the transcript of the evidence and digest the exhibits.

In the first *Morgan* case, 298 U. S. 468, 481-482, the Court stated that the duty of making the order "cannot be performed by one who has not considered evidence or argument". Further, the Court said: "... the officer who makes the determination must consider and appraise the evidence which justifies them". But it explained what it meant by "consider" by stating:

This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute in-

quiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates.

This necessarily means that the rule maker may utilize the analyzed and sifted report of the evidence instead of reading the record personally.

There are many decisions of inferior Federal courts in accord. In *Cupples Co. v. National Labor Relations Board*, 103 F. (2d) 953 (C. C. A. 8) the court said (p. 958):

The court (in Morgan Case #1) did *not* hold that the officer making the decision must necessarily read all the evidence. It conceded that the officer could rely upon analysis and summary of the evidence by competent subordinates. He must consider and appraise the evidence, but such consideration and appraisal may be based on the work of subordinates.

In the second Morgan case, the court held that it was not necessary to discuss the extent to which the Secretary examined the evidence and it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusion.

See also *Inland Steel Co. v. National Labor Relations Board*, 105 F. (2d) 246 (C. C. A. 7); *National Labor Relations Board v. Baldwin Locomotive Works*, 128 F. (2d) 39 (C. C. A. 3); *National Labor Relations Board v. Lane Cotton Mills*, 108 F. (2d) 568 (C. C. A. 5); *Norris & Hirshberg v. Securities and Exchange Commission*, 163 F. (2d) 689 (App. D. C.).

In the case at bar, the record shows that Mr. Kingsley read and was thoroughly familiar with the March 10 order promulgated by Mr. Ewing. The record shows that Mr. Kingsley did in fact refer to pertinent portions of the record of the first hearing. It shows that he did read the findings and conclusions of Mr. Ewing. Since Mr. Kingsley is permitted by all authorities to utilize the assistance of subordinates in sifting the evidence, had he done so there would be no question of compliance with the procedural requirements of the *Morgan* case. It certainly cannot be said that the analysis which Mr. Ewing

personally made and which culminated in the order of March 10 is less acceptable. The requirements of the *Morgan* case are not technical, and there was substantial compliance in this proceeding. The implicational argument advanced by the petitioner is not sufficient to overcome the presumption and evidence of official regularity. *Twin City Milk Producers Ass'n v. McNutt*, supra.

The *Donnelly Garment Co.* case (123 F. (2d) 215), cited by petitioner (Br. 80), does not hold that a presumption of regularity is overcome by mere allegation. Clear and convincing proof must be offered to rebut the presumption, and the only evidence in this case sustains it. The *Powhatan Mining Co.* case (118 F. (2d) 105), also cited, was an instance in which the record showed a denial of full cross-examination. That was held to be error, but no such point is present here. The case does not mean that a mere unsupported assertion is enough to show illegality.

A holding that Mr. Kingsley was required to re-evaluate the evidence that had been the basis of the March 10 order would have made it impossible to comply with the Court's directive that a prompt report be made on the evidence taken on the remand. Carried to its logical conclusion, it would effectively stop the administrative process by making all changes in existing regulations conditional upon a re-evaluation of the evidentiary basis on which action initially was taken. It could as well be argued that the March 10 order was void because Mr. Ewing did not recite that he had read and considered the evidence taken in the 1944 hearing held while Mr. McNutt was administrator.

We respectfully submit that error has not been shown in Mr. Kingsley's consideration of the additional evidence.

The decision in the second *Morgan* case finally turned on the absence of adequate notice of the Secretary's position for initiating the hearing, and the absence of any intermediate or tentative findings (304 U. S. 18-21). In the present case, however, pursuant to section 701(e) of the Federal Food, Drug, and Cosmetic Act, notice of hearing was published in the Federal Register containing a

detailed statement of the proposed regulations. After the hearing in July, 1947, a tentative order was issued on October 10, 1947. Petitioner objected and filed exceptions through its counsel. A final order was issued on March 10. Thus, the procedural steps that were observed take the case outside the rule established in the second *Morgan* case. Clearly, the Supreme Court there did not require that the head of an administrative establishment personally read each and every part of the record.

2. There Was No Error in the Hearing Examiner's Refusal to Permit Inquiry as to Whether a Food and Drug Administration Witness or its Counsel Prepared Parts of the March 10 Order or Whether the Administrator Consulted With Them.

The petitioner specifies as erroneous the rulings of the hearing examiner which precluded inquiry of the witness Callaway as to whether he wrote or had some hand in preparing the order of March 10 (Br. 47, Spec. (3)(b)(c) and (d)). Objection on the ground that the document imported regularity was sustained, and the examiner ruled that the inquiry was beyond the scope of the hearing (R. 960). Thereafter, petitioner's counsel made an "offer of proof" (R. 993) intended to show that Section 5(c) of the Administrative Procedure Act had been violated. The hearing examiner ruled that the section was inapplicable.

It readily will be seen from the colloquy between counsel for petitioner and the hearing examiner that petitioner was not prejudiced by the interruption of its so-called offer of proof. This is what occurred (R. 993-4):

MR. STEPHAN: I offer to prove by these questions presently addressed to Mr. Callaway and likewise questions yesterday that, in violation of my understanding of the Administrative Procedure Act, Section 5(c), the order in issue of March 10, 1948, violates so much of that section as provides that "save to the extent required for the disposition of ex-parte matters as authorized by law, no such officer (referring to the officers who presided at the hearings) shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate, nor shall such officer——"

PRESIDING OFFICER GODING: I hesitate to do this, but I think I am constrained to break in on you. I think what you are reading is entirely irrelevant to these proceedings, because what you are referring to, sir, relates exclusively to quasi-judicial matters; this is a rule making hearing and it is quasi-legislative, and I do not think you are gaining anything by any extended discussion of Section 5 or any part of it.

MR. STEPHAN: I will then accede to the Examiner's statement and preserve an exception as to whether or not the function presently before us falls within the classification indicated.

PRESIDING OFFICER GODING: Very well. Shall we get on now with interrogation?

Petitioner's position was sufficiently made clear by the quoted statement, and no prejudice ensued from the presiding officer's interpolation. Petitioner's contention that it was unfairly prevented from completing an offer of proof (Br. 80-81) is manifestly untenable. Any further discussion of the legal proposition involved would have needlessly cluttered the record.

(a) *Section 5(c) of the Administrative Procedure Act is inapplicable to the rule-making proceeding involved in this case.*

Petitioner seeks to apply the rule of separation of functions of administrative officials which applies in quasi-judicial or adversary proceedings to quasi-legislative or rule-making proceedings.

At the outset it should be noted that petitioner does not seriously contend that the administrative process under attack involved anything other than rule-making. Petitioner (Br. 81-82) quotes from *Federal Security Administrator v. Quaker Oats Co.*, 318 U. S. 218, 228, wherein the court, in passing on another food standard issued under sections 401 and 701 of the Federal Food, Drug, and Cosmetic Act, stated that the "review is of regulations of general application adopted by an administrative agency under its rule-making power in carrying out the policy of

a statute with whose enforcement it is charged.” Petitioner (Br. 83) also refers to the Final Report of the Attorney General’s Committee (1941), Doc. 8, 77th Cong. 1st Sess., pp. 108-110, and quotes therefrom that “Hearings in rule-making are usually . . . investigatory . . . The purpose is not to try a case.”

The standards under consideration in this case affect not only the petitioner but also all other oyster canners throughout the United States. There is no basis for a contention that this was a proceeding on issues between petitioner and the Agency.

It (Br. 81-90) contends, however, that Sec. 5(c) of the Administrative Procedure Act and judicial procedural due process precludes Mr. Callaway and counsel for the Food and Drug Administration from participating or advising in the promulgation of regulations involved here once the record was closed.

Sec. 5(c) prohibits officers or employees of the Agency from participating or advising in the decision of any case in which they were engaged in the performance of investigative or prosecuting functions for the Agency. The specific language of the Act makes it entirely clear that this provision is not applicable to rule making procedures. Section 5 applies and is limited to “adjudications”. “Order and adjudication” is defined in Section 2 as follows:

(d) Order and Adjudication.—“Order means the whole, or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter *other than rule making* but including licensing. “Adjudication” means agency process for the formulation of an order. (Italics supplied.)

As stated in Sen. Doc. 248, 79th Cong., 2d Sess., p. 24: “Section 5(c) is confined to adjudication (other than licensing) and does not apply to rule making.” Since the prohibitions referred to are in section 5(c) and section 5 deals solely with adjudications, the regulation making procedure under the Federal Food, Drug, and Cosmetic Act is not affected thereby.

In support of its contention, petitioner quotes from a Senate Committee Report. (Br. 84.) This quotation is distorted, however, as the result of significant deletions and is therefore highly misleading. The point sought to be made by petitioner in this incomplete quotation is that rule making is exempted from section 5(c), except in cases of rule making which generally involve sharply controverted factual issues.

The first answer to this is that in the framework of the Administrative Procedure Act rule making is not *exempted* from the provisions of section 5(c); it is not controlled by section 5(c) at all. Furthermore, the legislative history of the Administrative Procedure Act, including the excerpts from S. Rep. No. 752 which petitioner distorts, manifests a congressional desire to fix separate requirements for rule making and adjudication procedures. An accurate quotation of the excerpt upon which Petitioner relies, S. Rep. No. 752, 79th Cong. 1st Sess. (Administrative Procedure Act, Legislative History, 79th Cong. 2nd Sess., S. Document No. 248, pp. 203-4) is as follows:

The gist of the subsection is that no investigating or prosecuting officer shall directly or indirectly in any manner influence or control the operations of hearing and deciding officers, except as a participant in public proceedings, and even then in no different fashion than the private parties or their representatives. "Ex parte matters authorized by law" means passing on requests for adjournments, continuances, filing of papers, and so forth. The exemption of applications for initial licenses frees from the requirements of the subsection such matters as the granting of certificates of convenience and necessity which are of indefinite duration, upon the theory that in most licensing cases the original application may be much like rule making. *The latter, of course, is not subject to any provision of section 5.* The exemption of cases involving "the past reasonableness of rates" (if triable *de novo* on judicial review they would be exempted in any event) is made for the same reason. There are, however, some instances of either kind of case which tend to be accusatory in form and involve sharply controverted factual issues. Agencies should not apply the exceptions to

such cases, because they are not to be interpreted as precluding fair procedure where it is required. (*Italics supplied.*)

The meaning of this paragraph from S. Rep. No. 752 is clear enough without extended comment. Manifestly, in using the word "exemption" the Committee referred to the first two of the three exceptions listed, i. e., applications for initial licenses and proceedings involving the reasonableness of rates. Because of their similarity to rule making, generally, these two classes of proceedings were to be excepted from the provisions of Section 5(c). As the Committee stated, however, the exemption should not be applied in any specific case *under these two classes of proceedings* "which tend to be accusatory in form and involve sharply controverted factual issues."

This is entirely different from saying that all rule making proceedings which happen to involve instances of sharply controverted factual issues are subject to Section 5(c). The substance of what was done by the orders under review was clearly legislative and in no sense adjudicatory.

In its "General Comments" this same Senate Committee (Administrative Procedure Act, Legislative History, S. Doc. 248, p. 216) comprehensively summed up its attitude, expressly referring to its specific comment which is above quoted. The Committee elsewhere recognized that: "The bill provides quite different procedures for the 'legislative' and 'judicial' functions of administrative agencies." (S. Doc. 248, *supra*, p. 193).

There is, we suggest, nothing in the context of the Administrative Procedure Act nor in its legislative history which requires the abandonment of the historical practice of an administrative agency of utilizing its specialized personnel in the formulation of regulations of general applicability.

(b) *Judicial due process can not properly be invoked in the administrative rule making proceedings involved here.*

The 5th Amendment of the Constitution provides that:

No person shall be . . . deprived of life, liberty or property without due process of law.

We do not, of course, contend that this Constitutional inhibition is not applicable to legislative as well as judicial action. We do contend, however, that the "constitutional 'rudiments' of fair play" (Br. 85) in judicial proceedings should not properly be carried over and applied in quasi-legislative matters such as are involved here.

At the outset, we believe it is essential to note the distinction between administrative rule-making and administrative adjudication, which petitioner's argument and citation of cases tend to obscure (Br. 85-90). The following is an effective statement of the general distinction:

The most obvious definition of rule-making and the one most often employed in the literature of administrative law asserts simply that it is the function of laying down general regulations as distinguished from orders that apply to named persons or to specific situations. Most acts of legislatures, although by no means all, establish rights and duties with respect either to people generally or to classes of people or situations that are defined but not enumerated. Conversely, the judgments of courts usually are addressed to particular individuals or to situations that are definitely specified. Similarly, administrative action can be classified into general regulations, including determinations whose effect is to bring general regulations into operation, and orders or acts of specific application.¹⁸

It has long been recognized that the procedural requirements imposed in any given rule making activity are to be found in the statute which vests authority to issue the regulations. *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 303-312. In that case the Court applied the rule that under the Tariff Act of 1922 (42 Stat. 858, 941)

¹⁸ Fuchs, *Procedure in Administrative Rule-Making*, 52 Harv. L. Rev. 259, 263.

an opportunity "to produce evidence, and to be heard" did not confer a right of unlimited examination and cross-examination of witnesses, comparable to the rights of a litigant in a judicial trial. Said the Court (288 U. S. 308):

Nothing in the statute suggests a belief of the law-makers that every producer or importer is to be viewed, like a party to a lawsuit, as the adversary of every other, with the privilege of examination and cross-examination extended through the series.

It has been held that the 14th amendment of the Constitution *does not even require a hearing* to persons affected by general regulations or legislation. See *Bi-Mettalic Investment Co. v. State Board, etc.*, 239 U. S. 441. Under attack in that case was an order of an equalization board which petitioner claimed diminished the value of its property without due process of law. Said the court, through Mr. Justice Holmes, at p. 445:

The Constitution does not require all public acts to be done in town meeting or an assembly of the whole.

The same proposition was restated more recently in *Bowles, etc. v. Willingham et al.*, 321 U. S. 503. In that case the issuance of certain orders of the Administrator of Price Administration fixing maximum rents was sought to be restrained because no hearing was provided for by the statute (Emergency Price Control Act of 1942, 50 U. S. C. App. Supp. II, Sec. 901). The court pointedly stated (p. 519):

Obviously, Congress would have been under no necessity to give notice and provide a hearing before it acted, . . . Congress need not make that requirement when it delegates the task to an administrative agency.

Even where notice and public hearing have been given, there is no constitutional requirement that an administrative agency make special findings of fact as part of its rule making process. This was the holding in *Pacific States Box & Basket Co. v. White et al.*, 296 U. S. 176, which involved an order of a State administrative agency establishing standards of capacity and form for fruit and vege-

table containers. The Court disposed of the contention of such a requirement in the following language (p. 186) :

It is contended that the order is void because the administrative body made no special findings of fact. *But the statute did not require* special findings; doubtless because the regulation authorized was general legislation, not an administrative order in the nature of a judgment directed against an individual concern. (Italics added.)

It is clear from the foregoing that the procedural obligations imposed on an administrative agency in its rule making activities are not to be found in the Constitution, but rather in the statute which authorizes it to act. Cf. *Opp Cotton Mills etc. v. Administrator*, 312 U. S. 126, 152-153.

This is not to say that Congress can not impose additional procedural requirements, by general statute or otherwise, on the rule making activities of Federal agencies. Indeed, it has done this, in many regards, in the Administrative Procedure Act (5 U. S. C. 1001 et seq.) Preliminary to the passage of this law Congress and a host of legal specialists in the field of administrative law struggled with the task of prescribing an intelligent code of fair administrative procedure in all agency activities. In all of the reports, debates and comments and, most important, in the scheme and context of the law itself, the distinction between administrative rule making and adjudication was made clear. The historical development of the distinction between these two classes of proceedings was recognized and restated. Thus, "The Administrative Procedure Act is based upon a broad and logical dichotomy between rule making and adjudication, i. e., between the legislative and judicial functions." Attorney General's Manual on the Administrative Procedure Act (1947) p. 50. In the framework of the Act separate sections deal exclusively with rule making and adjudication: section 4 is concerned with rule making, section 5 with adjudications, and sections 7 and 8 fix the rules governing hearings and decisions in both classes of proceedings.

We have already pointed out above that the prohibitions in section 5(c) against investigative personnel participating in the decision is not applicable to rule making proceedings. This further point should be reemphasized: the zealous manner by which Congress sought to limit this prohibition to adjudications is pointed up by its exclusion of two categories of proceedings which formally might be classed as quasi-judicial but in fact usually have the attributes of rule making. These are proceedings involving initial licenses and rates, facilities or practices of public utilities or carriers.

Congress recognized the need for permitting agency heads to continue, in the formulation of regulations, the practice of utilizing the expert and technical knowledge of agency personnel. This proposition was succinctly stated in the Attorney General's Manual on the Administrative Procedure Act, p. 15:

Even in formal rule making proceedings subject to sections 7 and 8, the Act leaves the hearing officer entirely free to consult with any other member of the agency's staff. In fact, the intermediate decision may be made by the agency itself or by a responsible officer other than the hearing officer. This reflects the fact that the purpose of the rule making proceeding is to determine policy. Policy is not made in Federal agencies by individual hearing examiners; rather it is formulated by the agency heads *relying heavily upon the expert staffs which have been hired for that purpose.* (Italics added.)

We believe that the foregoing abundantly demonstrates the fallacy of petitioner's claim of prejudicial denial of procedural due process. It contends in effect that it was prevented from showing that officials of the Food and Drug Administration, who were involved in the hearing, actively participated in the drafting of the regulations now under attack. It is established that the Administrator's regulations fixing standards of identity and fill of container for canned oysters under Sections 401 and 701(e) of the Federal Food, Drug, and Cosmetic Act constitute rule making, and not adjudication. The Supreme Court expressly stated

in the *Quaker Oats Co.* case, 318 U. S. 218, 228, that standards such as these are “ . . . regulations of general application adopted by an administrative agency under its rule-making power . . . ”

The cases cited by petitioner (Br. 85-90) all involved judicial or quasi-judicial proceedings. This includes *Morgan v. United States* 304 U. S. 1, upon which petitioner places great reliance. For the reasons stated, such cases are inapplicable to the case before this Court.

Even under the principle of the *Morgan* cases, it would have done petitioner no good to show that certain officials participated in drafting the regulations. Had this been shown, it does not follow that the Administrator did not consider all of the evidence adduced at the hearing and exercise his independent judgment before signing the order of March 10.

In the second *Morgan case*, 304 U. S. 1, the Secretary of Agriculture testified in answer to the question whether the order represented his independent conclusion as follows (304 U. S. 18):

My answer to the question would be that that very definitely was my independent conclusion as based on the findings of the men in the Bureau of Animal Industry. I would say, I will try to put it as accurately as possible, that it represented my own independent reactions to the findings of the men in the Bureau of Animal Industry.

The court thereupon made this statement (304 U. S. 18):

In the light of this testimony there is no occasion to discuss the extent to which the Secretary examined the evidence, and we agree with the Government's contention that it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required. The Secretary read the summary presented by appellants' briefs and he conferred with his subordinates who had sifted and analyzed the evidence. We assume that the Secretary sufficiently understood its purport.

This alone reveals that the line of interrogation propounded by the petitioner and the offer of proof do not demonstrate prejudicial error. He was not entitled by interrogation of a witness who appeared at the hearing to probe the mental processes of Mr. Ewing in reaching a determination.

3. No Error Was Made in the Admission and Reliance Upon Certain Hearsay Evidence.

It is argued that "the orders should be set aside as based upon 'mere uncorroborated hearsay or rumor' ". (Br. 96.) Complaint is made both as to the admission of evidence of that character and the subsequent reliance upon it in the findings and conclusions (Br. 92).

The evidence to which this argument is directed was (1) reports by inspectors of the Food and Drug Administration designed to reveal dealer and consumer understanding as to any differences in canned oysters, as to any differences in fill of container for the food, and as to whether canned oysters from the South Atlantic and Gulf areas were being sold in competition with canned Pacific oysters (Ex. 4, 5, 6, and 7; Spec. 12; Br. 57, 92-96); (2) testimony of Inspector Hansen that he displayed commercially packed oysters and experimentally packed oysters to large scale buyers for quality comparison and recorded their comments (R. 878-882; Spec. 5(g), 38; Br. 52, 64); (3) testimony of Inspector Hansen that a woman packer told him during the experimental pack that she had no difficulty in making the higher fills (R. 866, Ex. 42; Spec. 5(f); Br. 51); and (4) testimony of Inspector Hansen as to opinion in the oyster canning business as to the new blanching method of preparing oysters for canning (R. 847; Spec. 5(i); Br. 52).

It is highly questionable whether a government survey made and reported by inspectors of the Food and Drug Administration in the performance of their official duties can be classified as "mere uncorroborated hearsay or rumor" as that language is used in the *Consolidated Edison* decision (305 U. S. 197). This was a fact finding proceeding preliminary to administrative rule-making. It was

essential to ascertain wholesale and retail merchandising practices and consumer understanding as to the fill of container. It was not practicable, especially in the absence of subpoena power, to call all of the people necessary to establish the facts. To have called any significant group of them would unduly have extended the hearing. But the results of the survey gave the necessary evidence in reliable form. It was the type of evidence that Congressional committees customarily rely upon in reporting legislation. The Food and Drug Administration inspectors had no incentive to misrepresent the facts, and should be considered as having performed their work with regularity.

The exhibits which reported the surveys were admitted into evidence without objection from counsel. No request was made that they be "decoded" to facilitate cross-examination. Under the principle of *Opp Cotton Mills v. Administrator*, 312 U. S. 126, 155,¹⁹ this evidence was entitled to its natural probative effect. There the findings rested "to a substantial degree, upon studies of statistical data with respect to [economic and competitive conditions in the industry] gathered by government agencies and published by them officially." The principal attack was upon a bulletin prepared by the Bureau of Labor Statistics.

The Court said:

... it has long been settled that the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies in the absence of a statutory requirement that such rules be observed. [citing cases]. We need not consider whether this class of evidence must be excluded from proceedings in court.

Further the documents in question were received in evidence without objection. And even in a court of law if evidence of this character is admitted without objection it is to be considered and must be accorded 'its natural probative effect as if it were in law admissible' . . .

The reliability of the data published in the Bulletin was supported before the Administrator by the testimony of some of his compilers. In the circumstances

¹⁹ See also *Spiller v. A. T. & S. F. Ry. Co.*, 253 U. S. 117, 130.

we think the Bulletin . . . [was] evidence to be considered by the Administrator; that the weight to be given to them and the inferences to be drawn from them were for the Administrator and not the courts, and that they lend substantial support to his findings.

It might be added that the finding of competition between oysters from the Gulf area and Pacific oysters is corroborated by petitioner's Exhibit 28 which reveals that competing cans were brought in the open market at Portland, Oregon. It is also corroborated by Exhibit 34 and by testimony of a Pacific canner (R. 445).

There is much authority to sustain the admission of the hearsay evidence,²⁰ and we need not labor the point. The only serious question is whether the evidence is reliable and may be taken into account in reaching a decision.

The House Committee on the Judiciary, H. R. Rep. 1980, 79th Cong., 2d Sess., reported that Sec. 7(c) of the Administrative Procedure Act requires that accepted standards of probity, reliability, and substantiality of evidence be applied. It said, however, that:

These requirements do not preclude the admission of or reliance upon technical reports, surveys, analyses, and summaries where appropriate to the subject matter.

²⁰ Sec. 7(c), Administrative Procedure Act, 5 U. S. C. 1006(c); and see explanation in Administrative Procedure Act, Legislative History, S. Doc. 248, 79th Cong. 2d Sess.; Attorney General's Manual on Administrative Procedure Act, pp. 75-78; Stephan, *Fact-Finding Boards and the Rules of Evidence*, 24 A. B. A. J. 630, 636. Mr. Stephan has written:

"It is submitted that no arbitrary rule can be applied to each case, but the test should rather be the availability of other or better, evidence. In each case, some final administrative action must be taken. This frequently affects large groups other than the contestants at the commission's bar. In this respect, it differs from a private plaintiff or defendant winning or losing a suit for deficiencies in evidence, without any resulting prejudice to the public. In administrative proceedings, the same hearsay evidence in one case may be the poorest sort, and fail to meet the suggested criterion. It should accordingly be excluded. In another case, the same evidence may be the best available proof of the facts and it should be admitted, regardless of exclusionary rules. Its credibility and weight can be tested by cross-examination and rebuttal. Its admissibility should be determined by the reasonable availability of better evidence."

The survey evidence, therefore, is clearly substantial to establish the facts for which it was cited in Findings 5 of the March 10 order under both Identity and Fill of Container.

The testimony of Inspector Hansen as to the reaction of buyers upon quality comparison of commercially canned oysters and oysters packed to yield 6½ ounces was corroborated by the testimony of Mr. Callaway and other Food and Drug Administration witnesses who testified as to a similar comparison (R. 800, 824-825). Mr. Esveldt testified that he based his opinions on quality largely upon his experience in cutting cans with buyers (R. 325).

Mr. Hansen's testimony as to the comments of the woman packer to the effect that she had no difficulty in meeting the fills is corroborated by testimony as to his own experience in putting up packs in three different canneries (R. 861, 866, 869-871, 1120).

The testimony as to discussions with canners regarding the blanching method of preparing oysters for canning and as to the quality of the resultant pack is corroborated by Exhibits 23 and 24, which are affidavits from canners, and by the testimony of Food and Drug Administration witnesses.

Thus, under the principle of *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 230, the hearsay was corroborated and may be relied upon. In *Union Drawn Steel Co. v. National Labor Relations Board*, 109 F. (2d) 587, 592 (C. C. A. 3), the court held in an adjudicatory proceeding that a finding of fact could be sustained by testimony of an employee who had been on strike as to what a foreman told him when the employee sought re-employment. The only evidence in corroboration was the known hostility of the employee to the labor union and the fact that the employee's place had been filled by another man. Much more corroboration is present in the case before this Court.

We believe that the correct rule to be applied is that stated by Circuit Judge Learned Hand in *National Labor Relations Board v. Remington Rand, Inc.*, 94 F. (2d) 862,

873 (C. C. A. 2), cert. denied 304 U. S. 576. Judge Hand stated that mere rumor will not serve to constitute substantial evidence in support of a finding

. . . but hearsay may do so, if more is not conveniently available, and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs.

The common law rule as to the exclusion of hearsay evidence, designed as it is to prevent a jury of untrained laymen from relying on evidence of little probative value, does not preclude the administrative agency from accepting and relying on the evidence here involved. Inspector Hansen was present, and was subjected to thorough cross-examination. There was ample opportunity for rebuttal.

It would not have been reasonable to require the presence of the buyers from six Seattle wholesale groceries, the packers in three canneries, and the several persons operating canneries in the Pacific Northwest before it could be shown that the blanching method of preparing oysters for canning did not result in a product of higher quality and that such oysters could be packed to yield a 6½ ounce cut-out weight from the No. 1 EO can without quality impairment. Responsible persons would readily rely upon the report of a Food and Drug Administration inspector who displayed the oysters to buyers for comparison, who was present when the packers were filling the cans, and who canvassed the industry to determine the facts as to whether the quality of canned oysters suffered when they were prepared for canning by blanching and were packed to yield 6½ ounces of drained weight. His testimony was in no sense mere uncorroborated hearsay or rumor. It was strongly corroborated evidence of the best kind available. We submit that it sustains the findings for which it was cited and was properly relied upon by the Administrator.

4. The Administrator and the Hearing Examiner Did Not Abuse Their Discretion in Rulings as to Time and Place of the Hearing, Requests for Postponement and for Separation of Issues, Admission and Exclusion of Evidence, or in Imposing an Improper Burden of Proof Upon Petitioner.

The courts have uniformly held that the time²¹ and place²² of a hearing, postponements,²³ and separation and consolidation of hearings²⁴ are matters within the sound discretion of the administrative agency or the hearing examiner.

The regulations here under review affect canners of oysters on the Atlantic, Gulf and Pacific coasts. The hearings were held in Washington, D. C., and were participated in by persons from the Gulf area, the Pacific Northwest and the Food and Drug Administration. The Administrator concluded that the convenience of all concerned would best be served by hearings in Washington, D. C. In that, no abuse of discretion existed.

Notice of the first hearing—which petitioner claims was unduly short so as to deny adequate opportunity for preparation (Spec. 4, 56; Br. 48, 70)—was published in the Federal Register on June 6, 1947. The hearing began on July 10, 1947. This was in complete compliance with the Federal Food, Drug, and Cosmetic Act, Sec. 701(e), 21 U. S. C. 371(e). Cf. *Opp Cotton Mills v. Administrator*, 312 U. S. 126, 153. In addition to the notice required by the statute, a statement of general policy or interpretation issued on February 7, 1947, a copy of which went to the petitioner, advised interested parties of the Administrator's intention to call a hearing on proposals to fix a standard of fill of container for canned oysters

²¹ *Peninsula Corp. v. United States*, 60 F. Supp. 174, 180 (D. C.).

²² *National Labor Relations Board v. Southwestern Greyhound Lines, Inc.*, 126 F. (2d) 883, 887-888 (C. C. A. 8).

²³ *National Labor Relations Board v. Algoma Plywood & Fencer Co.*, 121 F. (2d) 602, 605 (C. C. A. 7); and *National Labor Relations Board v. American Potash and Chemical Co.*, 98 F. (2d) 488 (C. C. A. 9).

²⁴ *American Trucking Ass'n v. United States*, 326 U. S. 77, 83; and *American Power & Light Co. v. Securities and Exchange Commission*, 141 F. (2d) 606, 614 (C. C. A. 1).

(Exhibit 8). Experimental packs of canned oysters were made in petitioner's plant as early as the spring of 1946. Experimental packs also were made on petitioner's behalf in June, 1947, before the notice of hearing issued (Ex. 19). Petitioner had ample notice, and the hearing on the remand afforded an additional opportunity to present evidence.

As to the request for separate hearings on the standard of identity and the standard of fill of container (Spec. 4(c) and (d); Br. 49-50), the hearing examiner ruled that it was more practicable to hear both standards together (R. 11-13). It was essential that the food be defined before a standard of fill of container could be effectively applied to it. No effort is made by petitioner to show abuse of discretion, and there was none.

(b) *Rulings on the Evidence.* The preceding point discusses the admission of hearsay evidence, and reliance upon it. *Supra*, pp. 62-66. Petitioner also complains of refusal to strike certain testimony (Spec. 5(f), (b), and (j); Br. 51-53); of a ruling that a question was objectionable because argumentative (Spec. 5(k); Br. 53); and of refusal to receive in evidence a number of cans of oysters to the end that they might be opened and evaluated by the Court (Spec. 5(l); Br. 53).

The reason given for the motions to strike testimony was that there was "no substantiating testimony of any quantitative or measurable kind whereby petitioner can in any way appraise the statements and that no documentary evidence had thus far been offered to support such a statement." We know of no authority, and none has been cited, to sustain the motions to strike. The complaint goes to weight and not admissibility of the evidence.

It is to be remembered also that rulings on evidence rest within the discretion of the hearing examiner, and prejudice must be shown to warrant reversal because of such rulings. Sec. 10(e), Administrative Procedure Act, 5 U. S. C. § 1009(e); *Kishan Singh v. Carr*, 88 F. (2d) 672 (C. C. A. 9); *National Labor Relations Board v. Hearst*, 102 F. (2d) 658, 662-663 (C. C. A. 9); *National Labor Rela-*

tions Board v. Burke Machine Tool Co., 133 F. (2d) 618 (C. C. A. 6); *National Labor Relations Board v. Condenser Corp.*, 128 F. (2d) 67 (C. C. A. 3). There was no denial of justice in overruling the motions to strike.

After the examiner had ruled that a question asked by petitioner's counsel was argumentative (Spec. 5(k); Br. 53), counsel was permitted to continue his interrogation by asking substantially the same question with the argumentative part deleted. No prejudice existed. There is no rule which requires a hearing examiner to stand idly by and permit a confused or misleading record to be made through the use of argument in questions. Cf. *Bethlehem Steel Co. v. National Labor Relations Board*, 120 F. (2d) 641, 652 (App. D. C.).

The offer of the cans of oysters was rejected (1) because the rules of practice [21 CFR Cum. Supp. 2.707(g)] forbid their receipt; and (2) because the offer was made for the purpose of presenting original evidence to the Court rather than to the Administrator. The suggestion that the cans might be opened and described for the record in comparison with cans of commercial production was rejected by petitioner's counsel (R. 1023-1030). There was no error in excluding the evidence.

In closing this point, we must point out that no evidence outside the record was resorted to by the Administrator. The hearing examiner ruled only that the work sheets were available in the Agency files *and could be placed in the record* by the Administrator if he wished to overrule the hearing examiner. This was *not done* and the work sheets were not considered except to the extent that they were developed in the cross-examination.

(c) *Burden of Proof*. Petitioner argues that the hearing examiner placed an improper burden of proof upon it in calling it the proponent of the rule (Spec. 5(m); Br. 54, 113-116). In this, it relies upon the Administrative Procedure Act, § 7(c), 5 U. S. C. 1006(c).

This proceeding turns in no way upon petitioner's failure to maintain a burden of proof. All that was required of petitioner was that, after the remand, it proceed to

adduce the evidence that it had described in its motion for the remand. That accorded with the court's order of remand.

Section 7(c) of the Administrative Procedure Act does not relieve a party of the burden of going forward in such circumstances. S. Rep. 752, 79th Cong., 1st Sess.; Administrative Procedure Act, Legislative History, S. Doc. 248, 79th Cong. 2d Sess., p. 208, states:

That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a *prima facie* case *but that other parties, who are proponents of some different result also for that purpose have a burden to maintain.* (Emphasis added.)

The Food and Drug Administration did not rest upon an inadequacy of petitioner's evidence. Instead, it presented evidence on its own behalf of much greater probative force than that presented by petitioner.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the orders under review have ample evidentiary support, were made in compliance with procedural safeguards provided by law, and should be in all respects affirmed.

ALEXANDER M. CAMPBELL,
Assistant Attorney General.

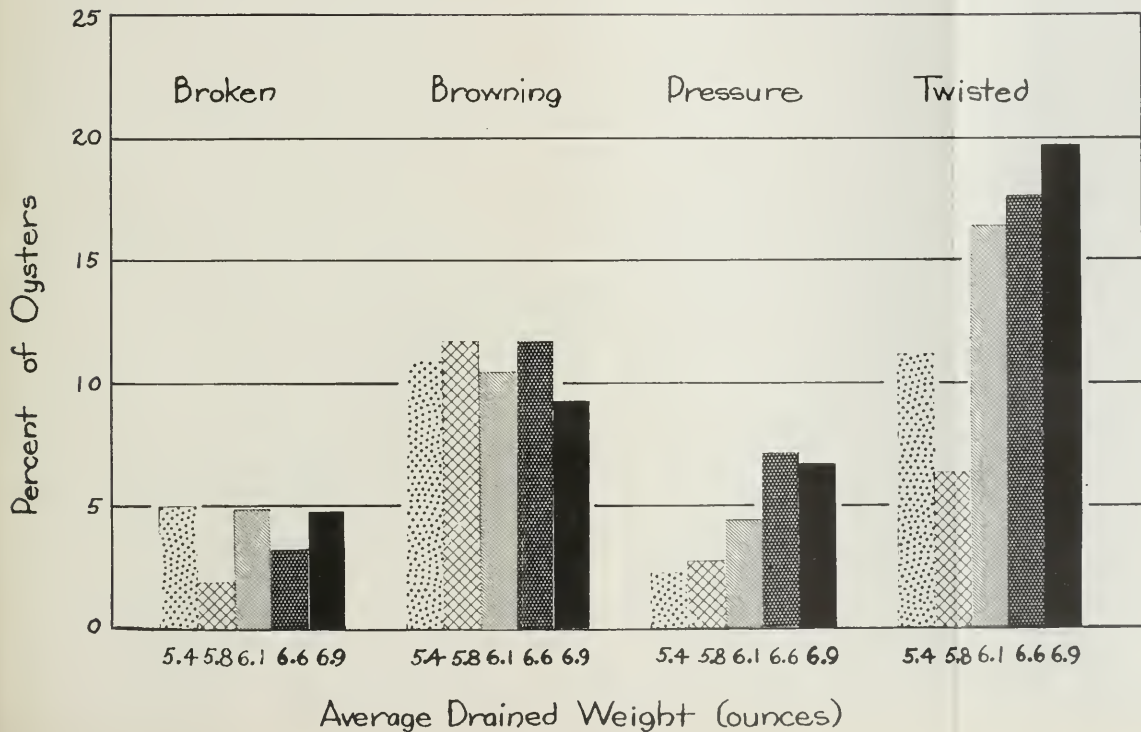
FRANK J. HENNESSY,
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Of Counsel:

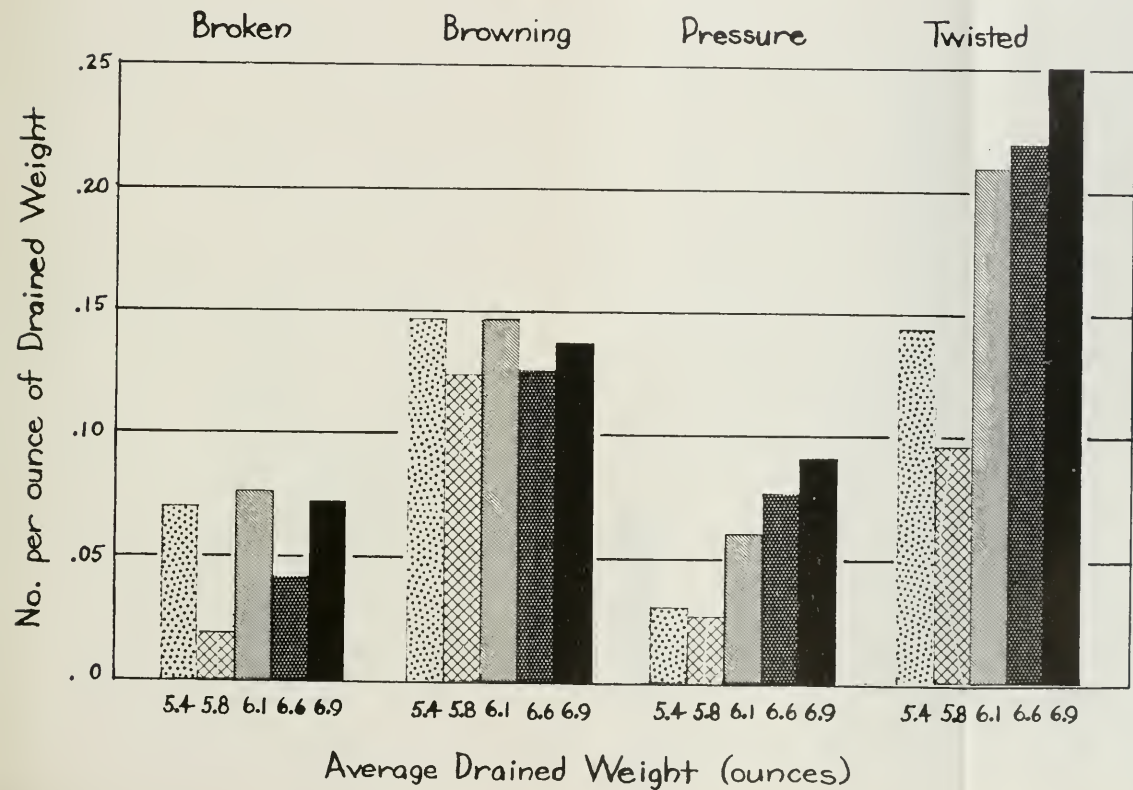
JOHN T. GRIGSBY,
Attorney, Department of Justice.

WILLIAM W. GOODRICH,
Attorney, Federal Security Agency.

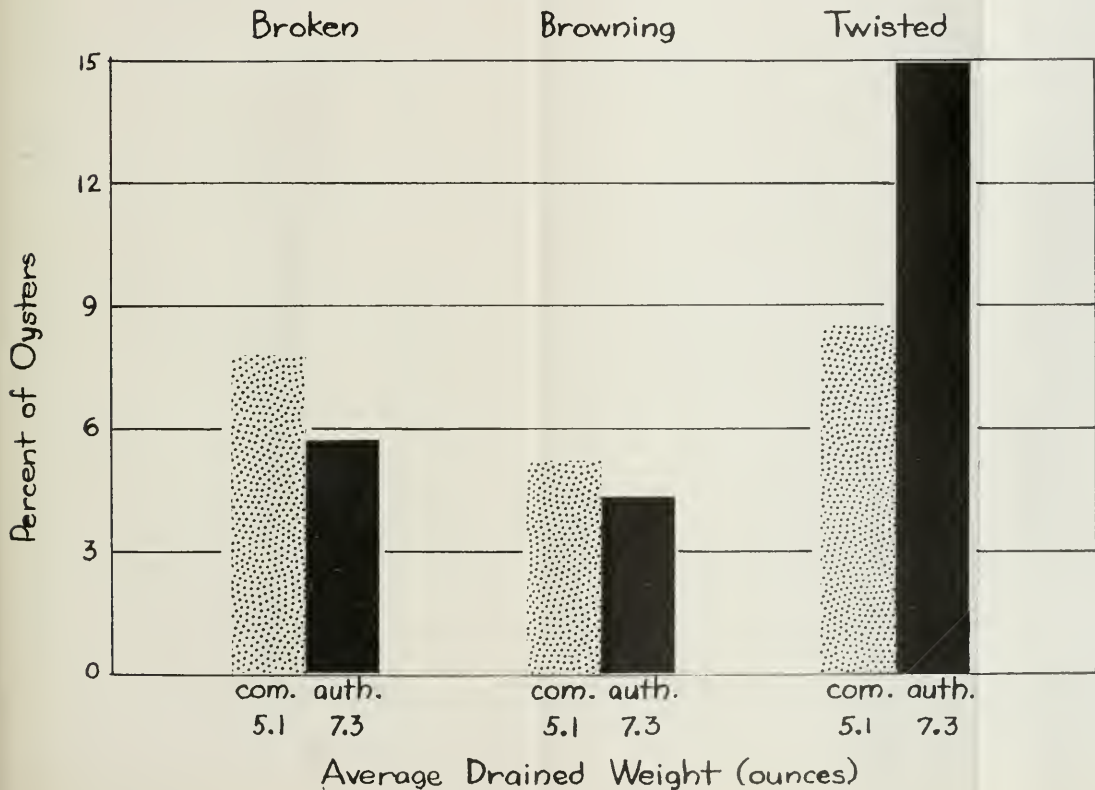
EXPERIMENTAL PACK OF PACIFIC CANNED OYSTERS



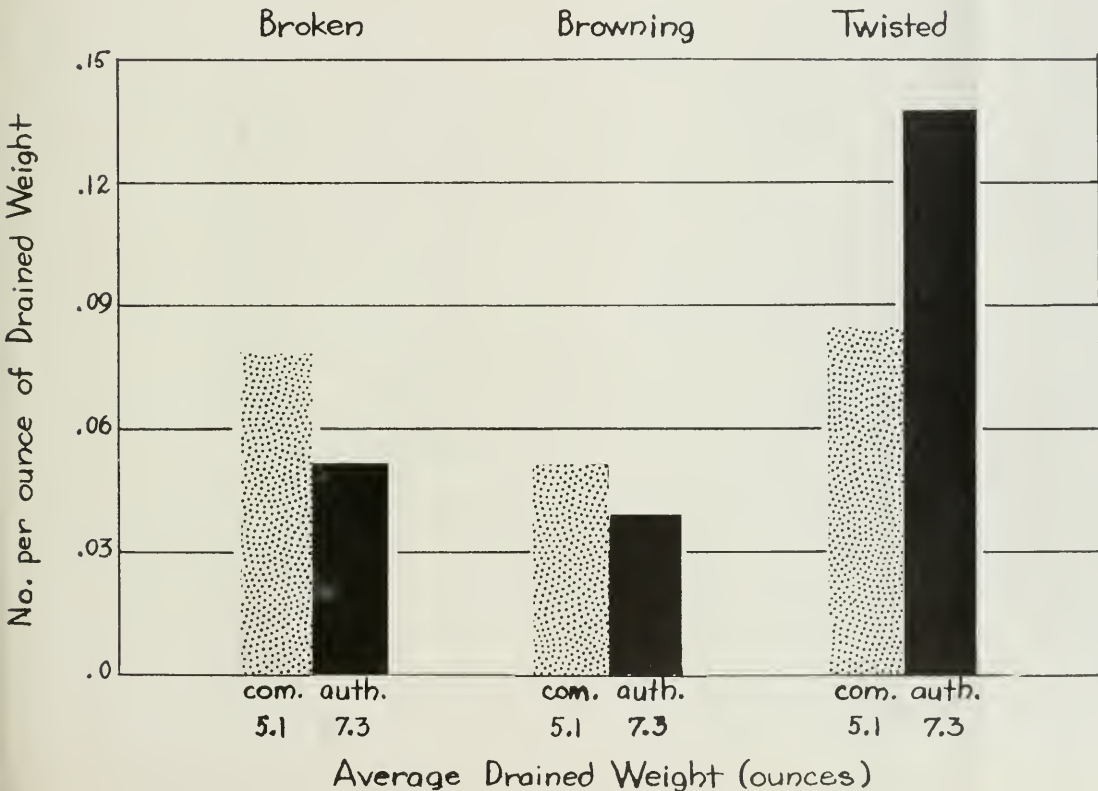
EXPERIMENTAL PACK OF PACIFIC CANNED OYSTERS



APPENDIX C

CANNED PACIFIC OYSTERS ~ COMMERCIAL AND AUTHENTIC
PACKS (BLANCHED) JUNE 1948 ~ DATA FROM EXHIBIT 33

CANNED PACIFIC OYSTERS ~ COMMERCIAL AND AUTHENTIC PACKS (BLANCHED) JUNE 1948 ~ DATA FROM EXHIBIT 33



**In The United States Court of Appeals
For the Ninth Circuit**

WILLAPOINT OYSTERS, INC., *Petitioner*

vs.

OSCAR R. EWING, Administrator, and J. DONALD
KINGSLEY, Acting Administrator, FEDERAL
SECURITY AGENCY, FOOD AND DRUG
ADMINISTRATION, *Respondents*.

REPLY BRIEF OF PETITIONER

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Of Counsel

Dated: December 29, 1948.

FILED

DEC 31 1948

PAUL P. O'BRIEN, -
CLERK

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Respondents.

No. 11936

REPLY BRIEF OF PETITIONER

I. THE BASIC ISSUES PRESENTED

This court is empowered for good cause to set aside the two instant orders of the Federal Security Administrator and of the Acting Administrator, because:

(a) the findings of fact in said orders are arrived at by accepting part of the evidence and totally disregarding other convincing evidence;

(b) the evidence upon which the findings purport to rely was changed and modified by cross-examination and shown to be incorrect by other admitted and established facts which were ignored;

(c) these findings and the orders involved the necessity of making a "choice" as to which witnesses "should be believed";

(d) the respondents did not make such choice, or see and hear the evidence, but instead they delegated the task of making such "choice" as to which witnesses "should be believed" and the preparation of findings to two subordinate employees whose opinions were necessarily biased;

(e) these two subordinates were, respectively:

(1) respondents' chief enforcement officer who had given the principal testimony in

support of respondents, and who also had been permitted by respondents' Presiding Officer to cross-examine industry witnesses extensively in an effort to impeach their opposing evidence; and

- (2) respondents' attorney, who likewise participated extensively in such cross-examination, and who had "buried himself in one side" of the case and was accordingly "disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions";

(f) the Presiding Officer sustained objections to cross-examination by petitioner's counsel into the existence of these prejudicial practices, and rejected, even before its completion, an offer of proof to establish the same; and

(g) neither of the respondents fulfilled his official duty to address himself personally to the evidence at both the first and second hearings, and upon all of that evidence conscientiously to reach conclusions.

Each of these deficiencies in the two orders is included in the detailed Specifications of Error and Argument sections of Petitioners' Opening Brief.

II. RESPONDENTS AVOID THE ISSUES¹

Respondents' brief² makes three principal contentions:

¹Respondents have not answered or otherwise challenged the allegations of the original or amended petitions for judicial review filed herein, nor countered many of the specifications of error. They rely solely upon the text of the orders and upon their brief.

²Reference abbreviations conform to style shown in Petitioner's Opening Brief, page 5, herein identified as "Pet. Op. Br." Its Specifications of Error Nos. 1 to 59 and Appendices A to F therein are noted,

- (a) that petitioner's argument goes to the weight of the evidence and that "it was for the Administrator to *resolve any conflicts* in the evidence and to *decide whether* the testimony of witnesses * * * *should be believed.*" (Resp. Br. 33);
- (b) that under the "substantial evidence" rule, the "*choice* of the Administrator is valid" even if petitioner's product is "driven from the market" (Resp. Br. 45); and
- (c) that neither the *Morgan* cases (298 U.S. 468; 304 U.S. 1), nor the Administrative Procedure Act, nor the Constitution, impose any "rudiments of fair play" or similar restraints of "judicial due process" on respondents, because they are engaged in "rule-making" which can not be "infected" with such procedural errors (Resp. Br. 49, 55, and 57).

But the Administrator and the Acting Administrator did not in fact "resolve any conflicts." Instead, their subordinate officers and employees, engaged in the performance of investigative and prosecuting functions in connection with these very matters, prepared the findings. They ignored much of the evidence (Pet. Op. Br. 79-90), and concluded what testimony "should be believed" and what "choice" should be made. This is not cured by respondents' subsequent signatures. Respondents' brief rejects the cases and authorities which condemn such practices (Resp. Br. 52-62).

III. CONGRESS AND THE COURTS REQUIRE THAT THE ADMINISTRATOR PRESERVE JUDICIAL DUE PROCESS IN SUCH ADVERSARY PROCEEDINGS.

The elaborate provisions of Section 701(e) of the

respectively as "Spec. —" and as "Pet. App. —." The Brief of Respondents is identified as "Resp. Br." and its Appendices A to D as "Resp. App.—." Emphasis supplied unless otherwise shown.

Federal Food, Drug, and Cosmetic Act specify detailed requirements for formal hearings under the Act. The unusually broad terms of Section 701(f) similarly spell out provisions for judicial review. But this statute has scant real significance if respondents' contentions be true.

Respondents' contentions are contrary to Congressional intent. Chairman Lea of the House Committee reporting the Act stated that Section 701(e) was drafted:

"before the Supreme Court made its famous decision in the (second) *Morgan* case (304 U.S. 1), but it, in substance, provides that the legislative agency shall do the very things that the Supreme Court said they should do in the *Morgan* case." 83 Cong. Rec. 9096 (1938).

Referring to judicial review, the Chairman stated:

"* * * We give more authority * * * under this bill than any white man ought to have unless with it there is proper restraint by the courts. That is what we have tried to do here." 83 Cong. Rec. 7776 (1938) (Pet. Op. Br. 90).

And more recently, these same manifestations of Congressional intent have been implemented by the Administrative Procedure Act (Pet. Op. Br. 13-17; Cf. 81-85).

It is submitted that Congress and the federal courts demand a vigilance to prevent "administrative discretion" from becoming a vehicle for overriding the laws which Congress has enacted.³

IV. RESPONDENTS' BRIEF MISCONCEIVES MANY DETERMINATIVE FACTS.

Within permissible space limitations we shall point out some of the manifest errors in respondents' brief,

³Pet. Op. Br. 75, *et seq.*; cf. Douglas, J. dissenting, *I.C.C. v. Parker*, 326 U.S. 60, 75 (1945).

following substantially the sequence of its arrangement. It would unduly burden this brief to repeat here contentions heretofore made in our opening brief.⁴

A. Errors in Respondents' Treatment of "Jurisdiction" (Resp. Br. 1, 3, 53-6).

1. Respondents contend that the order is "rule-making" and as such virtually free from judicial review. They disregard Supreme Court cases which have rejected such theoretical distinctions based on the "form" of administrative orders (Pet. Op. Br. 81-3).

Respondents quote from the *Quaker Oats Case* with respect to "rule-making" (Resp. Br. 53), but discount their own earlier quotation from this case (Resp. Br. 43), which holds that the judicial review provisions: "were patterned after those which Congress had provided for the review of '*quasi-judicial orders*' of the Federal Trade Commission and other agencies."

The instant case arose from charges of "unfair competition" brought by Southern canners (Callaway, R. 64). As such it closely resembles the "*quasi-judicial orders*" of the Federal Trade Commission. The instant proceeding was intensely "adversary" in character (Resp. Br. 56). It is not immune from

⁴It should be noted that while respondents take scattered exception to many of petitioner's specifications of error, they appear to have completely ignored and hence, by implication, to admit Specifications Nos. 3(a), 4(a) and (b), 5(a) (c) (d) (e) and (h), 9, 10, 11, 13, 14, 15, 16, 19, 20, 21, 29, 30, 31, 34, 35, 37, 39, 41, 45, 52, 55, and 57; and to have omitted to answer or comment on much that is alleged in other of the remaining specifications to which they make but passing reference.

review to determine whether the “rudiments of fair play” were accorded petitioner (Pet. Op. Br. 79-90).

2. Respondents state that the second order of respondent Kingsley:

“did not change the findings previously made (by respondent Ewing) but were supplementary thereto” (Resp. Br. 2),

and then contend that the *Morgan* cases are not applicable (Resp. Br. 49, 51, 61).

But the very first finding of respondent Kingsley states that respondent Ewing’s prior finding “*is modified*” in substantial respects (Pet. App. B, p. 15). Respondents themselves later acknowledge such “*modifications*” (Resp. Br. 9, n. 2). Still later, respondents seek to justify respondent Kingsley’s failure to *modify* another of respondent Ewing’s findings (Spec. 27) on the grounds that the evidence at the second hearing was “not in the record” when the first findings were made (Resp. Br. 27). Thus, at one point, respondents claim *modification* because evidence *was given* at the second hearing, and at another they disclaim *modification* because evidence *was not given until* the second hearing.

Respondents quote from a portion of this court’s first order directing a remand to take additional evidence (Resp. Br. 8), but they omit to point out that in said order this court expressly provided:

“that *the Administrator, after considering said evidence, may modify* his findings as to the facts, or make new findings by reason of the additional evidence so taken, and he shall file such *modified* or new findings, and his recommendations, if any, for the *modification* or setting aside of his original order, with the return of such additional evidence.”

Respondents ignore their legal duty to consider the evidence in its entirety (Pet. Op. Br. 77-8).

3. Respondents contend that the:

“Administrative Procedure Act does not affect the court’s jurisdiction * * *” (Resp. Br. 2).

This is directly contrary to the law and to its legislative history (Pet. Op. Br. 81-5).

This amazing contention will certainly shock the distinguished Chairman of the Senate Committee on the Judiciary who, leading a unanimous Senate to adopt the measure, believed it prescribed basic criteria of *administrative fair play* for all types of administrative orders and conferred jurisdiction upon the courts to enforce such requirements. See *Administrative Procedure Act, Legislative History*, 79th Cong. 2d Sess., S. Doc. 248, pp. 324-6; also McCarran, *Improving Administrative Justice* (Dec. 1946) 32 A.B.A.J. 827, 893-4; and McCarran, *Regulatory Government*, (Nov. 1948) 34 A.B.A.J. 1005, 1007-8.

B. Errors in Respondents’ “Statement of the Case” (Resp. Br. 3-10).

1. Respondents disparage in their brief the validity of their own long-continued requirements for a 5 ounce drained weight, and state:

“The Food Inspection Decisions * * * *are in no sense standards* of fill * * *.” (Resp. Br. 3)

But six months earlier, in this very proceeding, respondents tendered to this court an affidavit of the Federal Commissioner of Food and Drugs, which stated:

“a drained or cut-out weight of 5 ounces of oysters * * * *was in accordance with an advisory standard established under the Food and Drug Act of 1906.*” (Dunbar Affidavit, filed herein by respondents June 3, 1948, page 3, lines 21-3).

As recently as 1943 the Supreme Court so recognized these standards. *Security Adm’r v. Quaker Oats Co.*, 318 U.S. 218, 233, n. 8.

The full text of pertinent advisory standards are shown in our brief (Pet. App. D). They expressly fixed the 5 ounce drained weight. They are referred to in Findings 1 and 2 of respondents' own Ex. 3 in this case (the 1944 order, reprinted, Pet. App. C, 25-6). The Administrator recognized such conformity with this 5 ounce standard in Finding 12 of his 1944 order (Pet. App. C, 29).

2. Respondents suggest that the change is not precipitous, and that the 1942 Tin Conservation Order M-81 was based on respondents' experimental work "made available to WPB" (Resp. Br. 4). That statement, if true, does not appear to be in the record. Moreover, two years later in 1944, respondent found that:

"Very little experimental work has been done by the Administration on Pacific Coast canned oysters, the principal reason being that none have been packed there since 1942" (Pet. App. C, 28).

3. Respondents recognize that in April 1948 petitioner protested against the discriminatory requirement to change their label to "Pacific Oysters" and sought to have the order modified before it became effective. But respondents now contend that no further evidence was offered by petitioner on this point at the second hearing (Resp. Br. 5).

Respondents omit to note that they had denied the April, 1948, petition and that their Presiding Officer's ruling limited evidence at the second hearing solely to the new blanching process, thereby precluding petitioner from offering further evidence on the issue of "common or usual name so far as practicable" (R. 705, 725).

However, at the second hearing respondents offered petitioner's label in evidence and by cross-examination confirmed that petitioner's canned oysters have been continuously for more than 16 years labeled as

“OYSTERS” and not as “PACIFIC OYSTERS” (Ex. 31, R. 755, 759).

4. Respondents improperly summarize the effect of Finding 5 by omitting its reference to the matter of labels showing total weight rather than drained weight (Resp. Br. 6; Pet. App. A, 8-9).

An advisory standard effective since 1923 states:

No. 379. “Declaration of net weight on canned clams and canned oysters.—Because the liquid packing medium in canned clams and canned oysters has a certain food value and is ordinarily utilized as food, no objection will be made to marking the net weight of these products in terms of total weight, liquid included.” (Pet. App. D, 40).

Nothing in either of the two challenged orders alters this permission. Nor have respondents otherwise exercised their authority under the provisions of the Act to revoke the long-continued permission granted by Opinion No. 379. Accordingly, both methods of showing weight have been followed. But the only Western label of record in the first hearing shows “Contents 5-ounces Oyster Meat” (R. 634). Petitioner’s labels showed “net weight in terms of total weight” (Ex. 31).

But, responsive to the oral suggestion made by a member of this court at its first hearing in June 1948, petitioner voluntarily imprinted, immediately thereafter, on all of its labels the *additional* bold face type:

**“NET DRAINED WT.
5 OZ. OYSTER MEAT”**

Its cans, accordingly, now show both the permissible “net weight in terms of total weight” and the “drained weight.” This gives the fullest possible information to consumers (R. 755, 759).⁵

⁵See verified Motion for Order Granting Permanent Injunction and Continuing Stay, page 10, filed herein August 19, 1948.

But respondents did not modify Finding 5 to reflect this further evidence. Instead, Finding 5 continues to state:

“The canned Pacific oysters were often labeled to show the total weight of oysters and liquid in the can but not the drained weight of oysters.”

Finding 5 then refers to certain hearsay testimony as to the views of wholesalers, retailers, and purchasers (Pet. Op. Br. 94-5). It then states:

“*This is a condition likely to confuse and deceive customers.*”

But such finding does not show to which antecedent “condition” the word “this” refers. It is not the “detailed finding of fact” required by Section 701(e) of the Act. It is impossible to determine on what “condition” the conclusion of Finding 5 is based. In *U.S. v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 510-11 (1935), the court annulled a “rule-making” order, stating:

“We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. One gains at places the impression that the Commission looked upon the proposed reduction as something more than a disruptive tendency * * *. The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. *In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency.* (Citing cases.) We must know what a decision means before the duty becomes ours to say whether it is right or wrong.”

5. Respondents contend that there is no resultant quality impairment in a 6½ ounce fill (Resp. Br. 6). This is directly contrary to the substantial evidence of record, including changes made by witnesses for

respondents on cross-examination which modified their prior testimony, and which was ignored. This relates primarily to browning of oysters and to other disfigurements impairing quality and appearance. It has been so fully discussed heretofore that it needs no further comment (Pet. Op. Br. 96-100, *passim*).

6. Respondents seek to disparage the evidence offered by petitioner at the second hearing held on 20 days' notice in Washington, D. C. (Resp. Br. 7-8), and to justify their own discretion as to the time and place of the hearing (Resp. Br. 67).

The truth is that petitioner's evidence consisted of its oral testimony and of Exhibits 25 to 30, which contain eleven affidavits with respect to: (a) the blanching process and test packs of overfilled cans; (b) reports on scientific examinations showing resultant quality impairment of a test pack of 24 cans of oysters which were intentionally overpacked by respondents' inspector; (c) detailed scientific volume studies of raw oysters as affected by blanching and by pre-steaming processes; (d) separate food quality reports by each of the participating members of a Food Panel assembled to evaluate the quality of various types of identified canned oysters; (e) report on scientific analyses of liquid and protein and solid in various identified types of canned oysters; and (f) a chemical analysis showing that the food value of the liquid packing medium (exclusive of the oysters) in cans of Willapa Oysters compared favorably with the food value of the *total* food content of cans of other well known products.

It is respectfully urged that such oral testimony and affidavits be reviewed by this court to determine whether they deserve the deprecating comments made by respondents, or whether they are substantial evidence which respondents chose to ignore.

7. Respondents contend that:

"Pacific oysters canned after blanching are no better than those canned after pre-steaming."
(Resp. Br. 10)

This is directly *contrary* to the evidence, including the *only consumer evidence of record*. Ex. 28 is the detailed report of a Consumer Food Acceptance Test Panel conducted by trained and impartial observers of canned Southern oysters and of steamed and blanched canned Western oysters. It was completely ignored.

A witness for respondents testified that respondents had intended to offer the results of a similar consumer food acceptance panel, but explained:

"because of the shortage of time I was not able to get the panel together." (R. 1105)

Thus at one point respondents reprove petitioner for the quality of its evidence assembled within twenty days, but at another point respondents excuse their own omission to offer one single item of probative consumer evidence at either hearing as due to "the shortage of time."

Respondents apparently seek to explain the haste as due to this court's order for further hearing and report within two 30 day periods, respectively (Resp. Br. 8). But they omit to note this court's express authorization that:

"either 30 day period may be extended by the court upon representation by the *Administrator* that a longer period is needed for the proper discharge of his duties * * *." (C.C.A. Order, June 8, 1948, p. 3-4).

8. Respondents contend (Resp. Br. 10) that a lighter drained weight permits a canner to replace "two ounces of oysters with two ounces of water." Respondents omit to state that (a) Western oysters have always been canned, since 1928, at the lawful 5 ounce drained weight pursuant to Food and Drug Advisory

Standards (R. 64), or (b) that Southern oysters had been voluntarily canned at a 7½ ounce drained weight beginning in 1942 (R. 550).

Respondents also disregard the fact that their present orders rescind their prior 1944 order (Pet. App. C). The 1944 order established that the voluntarily adopted 7½ ounce drained weight for Southern oysters was reasonable for that species or size. But the 1948 orders would prescribe a 6½ ounce drained weight for all canned species and sizes, regardless of biological differences and regardless of packing methods.

Thus it is respondents who, by the new orders, would affirmatively permit Southern producers "to replace an ounce of oysters with an ounce of water."

9. Respondents state that the liquid drained from canned oysters is much less valuable than oyster meat (Resp. Br. 10). Respondents ignore basic distinctions between the Western and the Southern species and packing methods, as set forth in Finding 9 of their 1944 order (Pet. App. C, 28):

"In general, Pacific Coast canneries do not steam to the same extent as Atlantic and Gulf canneries. *In Atlantic and Gulf packed oysters there is usually a slight gain in weight during processing in the can, whereas in Pacific packed oysters a considerable part of the total shrinkage takes place in the processing with a consequent loss of weight.*"

Respondents omit to note that, since Southern oysters usually "gain in weight" in the can, the Southern liquid of necessity consists chiefly of the identical brine in which they are packed; whereas, since Western oysters during processing in the can exude their own body content into the brine packing medium, with a "consequent loss of weight," the resultant Western packing medium becomes a nectar of the natural ingredi-

ents of the oyster, admixed with the packing medium, and having a high food value (Kincaid, R. 167-70).

Respondents thus confuse the two entirely different processes and ignore Dr. Charlton's report which showed that:

"the liquid portion of Willapoint canned oysters has a significant food value quite comparable to the entire contents of other well-known canned foods." (Ex. 30).

10. Respondents conclude on these false premises that:

"The *put-in weight* of oysters, therefore, is not an accurate measure of fill of container and would be only if all oysters were pre-cooked to the same degree before weighing into the cans." (Resp. Br. 10).

Respondents later refer to the Administrator's order with respect to canned peaches (Resp. Br. 18, n. 3; Callaway, R. 484), but do not point out that the Administrator there prescribed the very *put-in weight* method which is now opposed in the oyster case, although the reasons stated therein are substantially identical (Spec. 45). In the *Canned Peaches* case, 4 F.R. 4920; 7 F.R. 1612; 1 C.C.H. *Food, Drug, Cosmetic Law Reporter*, Para. 2139 at 2141, the Administrator said:

"1. The quantity * * * which can be placed in a container *varies, depending upon the method of packing and upon the shape, size, degree of maturity, and specific gravity of the units* * * *.

"2. With the exception of comparatively few slack filled cans, *canned peaches* * * * *contain the maximum quantity* * * * *which, using reasonably good factory practice, can be placed and sealed in each can and processed by heat to prevent spoilage, without crushing or breaking the peach units.*

"3. The maximum quantity * * * *varies, depending on the size of the container, the method of packing, the form, size, firmness of units, the nec-*

essity for having sufficient liquid to insure proper processing, and other factors.

“4. The can should contain the greatest number of peach units the canner can place therein and properly seal and process.

“5. * * * canners know the greatest amount of peach units which can be placed in a can of any given size without damage, and canners employ inspectors to insure proper filling by packers.

“6. *None of the various methods which have been studied for objective measurements of fill have shown any uniform correlation between the quantity of peach units put in and the quantity of peach units cut out. Assurance to the consumer of a can full of peaches can be obtained only by a requirement as to the quantity put in the container.*”⁶

V. RESPONDENTS' ARGUMENT MISCONSTRUES THE EVIDENCE AND THE LAW.

1. Respondents contend in their argument that petitioner has not indicated any findings which are not supported by substantial evidence (Resp. Br. 14). Respondents misconceive a major portion of petitioner's brief, including Specifications 6 to 50, inclusive (Pet. Op. Br. 54-72), and the argument in support thereof (Pet. Op. Br. 91-116).

2. Respondents assert that all of the evidence supports Finding No. 1 that the species *ostrea gigas* is commonly known as “Pacific Oysters” when canned (Resp. Br. 14-18). This is not correct. Petitioner has shown respondents' manifest error in construing

⁶Substantially identical *put-in weight* requirements obtain as to many other canned products, including canned apricots, 5 F.R. 93, 7 F.R. 1612, 1 C.C.H. Para. 2153 at 2155; canned cherries, 5 F.R. 98, 2399, 7 F.R. 1612, 1 C.C.H. Para. 2163 at 2165; canned pears, 5 F.R. 102, 7 F.R. 1612, 1 C.C.H. Para 2175 at 2177.

the evidence and the injustice of requiring petitioner to change its "common or usual name" (Pet. Op. Br. 111-13).

Respondents rely on the *Twin City Case* and the *Columbia Cheese Case* (Resp. Br. 17). But these cases turn on substantial evidence, which is lacking in this case.

Moreover, the "finding" does not satisfy the required legal standard of a "detailed finding of fact" in prescribing that the "common or usual name so far as practicable" of "**OYSTERS**" must now be abandoned by petitioner after more than 16 years of accepted usage, and a new one now adopted (Pet. Op. Br. 116).

Respondents also rely on their order with respect to canned peaches (Resp. Br. 18, n. 3). It will be noted that the Administrator did not expropriate the generic word "**PEACHES**" to any particular variety or to any exclusive geographical section, but required only that each *and every* species be appropriately described as a "type of **PEACHES.**" Petitioner asks no more here.

If Southern oysters were *required* to be appropriately described as "**COVE OYSTERS**", as Western oysters are *required* to be described as "**PACIFIC OYSTERS**" (or any of the other alternative terms common to each were required), petitioner would not complain.

But petitioner with good cause does strenuously protest when the Southern area of the oyster industry unlike *any* area of the peach industry, would by this order receive a new and exclusive use of the generic term "canned **OYSTERS**", while petitioner is compelled to abandon its continuous lawful use of this identical generic term for more than 16 years (Ex. 31, R. 755, 759).

3. Respondents contend that there is substantial evidence to support a 6½ ounce drained weight requirement without quality or appearance impairment (Resp. Br. 18-39).

This argument begins with a statement, not of record, with respect to an alleged fundamental principle that in non-transparent containers, it is common knowledge that the customer will choose the largest except for price considerations (Resp. Br. 18).

Rather than departing from the record, respondents should have concluded that, as in the case of many canned products, consumers seek first of all quality and natural flavor resembling the fresh product (R. 605), which all canners agree is superior when fresh-opened oysters are canned under favorable conditions in their natural liquids rather than when dehydrated and canned (R. 46; 453-5; 554-5; 717-725).

Respondents have ignored the evidence as to effect of over-fill on quality and appearance (R. 527, 662, *passim*). Browning is the most serious defect resulting from overpacking (R. 731; see Pet. Op. Br. 96-110). It ranges from a faint tinge of yellow-brown to the brown color of a Philip Morris cigarette package (R. 332; 666-9). It ranges from a very slight to heavy browning (Rowe, R. 666-9). Contrary to respondents' statement that no browning resulted (Resp. Br. 21), serious browning did result and there is serious difficulty in packing the heavier fills (Pet. Op. Br. 96-100). Increased twisting, pressure marks, and breakage also result (Ex. 14, 15, 16, 27). The difficulties of filling to a 6½ ounce fill of Western oysters are graphically illustrated by photographs of record in this case (Ex. 37), and by improperly rejected Ex. 39 (Quoted in full text, Pet. App. F, 55-61; See Spec. 5(f)).

Respondents refer to certain charts appended to

their brief (Resp. Br. 23, 32; Resp. App. A to D). Petitioner has analyzed these Appendices and comments: First, that these charts are not in the record, but apparently made from work sheets, the absence of which is complained of herein (Pet. Op. Br. 100-102); second, if purportedly taken from unidentifiable data of record, these charts are grossly inaccurate; and third, that these charts utterly disregard and give no weight to respondents' own testimony as to varying degrees of browning (R. 913-5).

It is the qualitative appraisal of browning that is of greatest importance in this case. Respondents brush aside the inconsistencies in their own Ex. 33. Respondents ignore the contradictory evidence of Mr. Callaway with respect to degrees of browning (Pet. Op. Br. 97-100) on the ground that it goes "to the weight of the evidence and not to its admissibility" (Resp. Br. 33).

4. Respondents contend that it was the duty of the Administrator to "resolve any conflicts in the evidence and to decide whether the testimony of witnesses who appeared at the hearing should be believed" (Resp. Br. 33).

It is this insistence by respondents that the Administrator has exclusive jurisdiction to "resolve any conflicts" and to determine who "should be believed" (Resp. Br. 33) that marks the sharp difference between ordinary rule-making in non-controversial matters and the quasi-judicial nature of this adversary proceeding. Where credibility of witnesses is involved clearly there should be dispassionate and objective evaluation of their evidence. Cf. *Smith v. Dental Products Co.* (C.C.A. 7, 1948) 168 F. 2d 516, 518-19.

The problem was recognized in a related Food and Drug case, *United States v. Lord-Mott Co.* (D.C. Md., 1944) 57 F. (Supp.) 128, 132, in which the

court rejected the dominant weight which the Administrator had given to its own witnesses. It said:

“The testimony is not all to that effect, and due credence must be given to the opposing testimony of the witnesses for the Government. But the court cannot blink the fact that they are naturally interested, or biased, in seeing that their work or the work of their associates in this matter is upheld, and when such *highly qualified witnesses* as the head of the Horticultural Department of the University of Maryland and the Executive Secretary of the Tri-State Packers Association testify, as they did, (on behalf of industry) * * * the Court feels that their testimony must be given greater weight than the testimony of the Government’s witnesses.”

An identical parallel exists here. Controlling weight is given to the testimony and “opinion” of Mr. Callaway, the Administrator’s enforcement officer. The findings of fact in both final orders rejected the testimony of petitioner and of “highly qualified witnesses,” including Dr. Trevor Kincaid, Chairman of the Department of Zoology, University of Washington; Dr. Ray W. Clough, Chemist and Ass’t. Director, Northwest Branch, National Cannery Association; and Dr. David B. Charlton, owner and director of Charlton Laboratories of Portland, Oregon; and a competent and unbiased panel of food experts. The qualifications of all these witnesses are set forth in detail in the record and are summarized in the Index (Pet. Op. Br. xii, xiv, xv).

VI. RESPONDENTS HAVE IGNORED STATUTORY AND JUDICIAL REQUIREMENTS FOR FAIR PROCEDURE.

1. This brings us to respondents’ defense “that the orders were made in careful observance of the procedural safeguards provided by law” (Resp. Br. 46-70).

Respondents first note but brush aside the detailed matters of record, showing the lack of observance of procedure required by law (Spec. Nos. 1, 2, 3(a) to (e), 4(a) to (e), 5(a) to (m), Pet. Op. Br. 45-54, 75-90). They take refuge in denying that the *Morgan* cases are applicable, and in stating that administrative rule-making protects them from judicial review of procedural due process.

First, contrary to respondents' assertions, the *Morgan* cases are definitely and specifically rule-making. They involve "the approval or prescription for the future of rates." In *St. Joseph Stock Yard Co. v. U. S.*, 298 U.S. 38, 42 (1936), the court enunciated the familiar principle that:

"Rate making, of course, is a legislative process."

The *Morgan* cases involve identical considerations where Secretary Wallace was restrained from enforcing an order:

"fixing the maximum *rates to be charged.*"

298 U.S. 468, 471.

Second, Congress, in enacting the Administrative Procedure Act, in Section 2(c), expressly defined "rule-making" as including:

"the approval or prescription for the future of rates * * *."

It must follow, therefore, by either test, that the *Morgan* cases are applicable to the present case, which respondents term "rule-making".

2. Respondents contend that Section 5(c) of the Administrative Procedure Act has no application, relying on portions of the text of the Senate Committee Report (Resp. Br. 55). Petitioner also relies likewise on that text (Pet. Op. Br. 84), and respectfully submits that any fair reading of the Committee Report confirms petitioner's construction of Congressional

intent exactly as shown (Pet. Op. Br. 84-5). If further confirmation be needed that Congress intended that all agencies, including the Food and Drug Administration, observe judicial due process where sharply contested issues of fact exist, it is found in the broad language of Senator McCarran's parallel statement. He said, in reporting the bill to the Senate:

"The exemption of rule making and determining applications for licenses, from provisions of sections 5(c), 7(c), and 8(a) may require change if, in practice, it develops that they are too broad. The committee believes it has followed sound discretion in selection of the language used, and *it is the feeling of the committee that, where cases present sharply contested issues of fact, agencies should not as a matter of good practice take advantage of the exemptions.*"⁷

3. Respondents cite from the Attorney General's Manual, p. 15, but omit to cite p. 13 and 14 which recognize the overlapping definitions of rule-making, order, and licensing, and states that the definitions:

"leave many questions as to whether particular proceedings are *rule-making* or *adjudication*" (p. 13),

and that:

"Typically, *the issues (in rule-making) relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts.*" (p. 14)

This case is not such "typical" rule-making. In this case unlike non-controversial rule-making, respondents acknowledge that the determination of "evidentiary facts", including credibility of witnesses, is the controlling issue (Resp. Br. 33).

The difficulty with respondents' contention that the

⁷Administrative Procedure Act, Legislative History, 79th Cong., S. Doc. 248, pp. 324-5.

Administrator should "resolve any conflicts in the evidence and * * * decide * * * (which) witnesses * * * should be believed" is that it does not square with the facts. The "resolving", "deciding" and "believing" were accomplished *ex parte* not by the Administrator, but by his witness who gave the very "conflicting testimony" in issue, and by his counsel who advocated it. These gentlemen (whose personal integrity is not questioned) are of necessity disabled from subsequently evaluating dispassionately such a conflict with themselves.

4. If any case requires a dispassionate and non-biased judgment, it is this one. It presents substantial economic conflicts as to petitioner and other Western packers on the one hand and as to the Administrator and Southern packers on the other. It began before the proceeding was even started, or before any evidence was taken, with an unwarranted and prejudged implication by the Administrator that Western packers were unlawfully adulterating or misbranding their products (Pet. Op. Br. 28). It began because of "violent complaint" of Southern packers (Callaway, R. 64). Realism requires a recognition of the struggle. In *St. Joseph Stock Yards v. U. S.*, 298 U.S. 38, 52 (1936), Chief Justice Hughes said:

"* * * Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient."

And Mr. Justice Brandeis and his brethren concurred, at page 73:

"* * * The inexorable safeguard which the due process clause assures is * * * that the trier of the facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be con-

ducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed.”

5. Respondents contend that petitioner’s case is based on “inferential arguments”, quoting from the *Cupples* case (Resp. Br. 50). But respondents omitted (without indicating asterisks) two significant sentences of that quoted text reading:

“Here there is no allegation that there was no study and consideration of the record. On the contrary, it affirmatively appears that the subordinates did what the first *Morgan* case said they might do. Every presumption of regularity attends the action of the Board.”

Cupples Co. v. N. L. R. B. (C.C.A. 8, 1939),
103 F. 2d. 953, 958.

Contrast that with the situation here. *Here* there are allegations based on the record which shows that the two respondents did not conscientiously read or consider all of the evidence (Pet. Op. Br. 45-6, 76-8). *Here* it affirmatively appears that the subordinates did not comply with the *Morgan* case. *Here* there is cross-examination and an interrupted and rejected offer of proof to show that the orders were prepared by respondents’ adverse witness and by respondents’ opposing attorney. *Here* there can be no presumption of regularity. *Here* there is an unconscionable and unlawful departure from the “rudiments of fair play” in combining judge, jury, prosecutor and prosecuting witness, and in permitting them *ex parte* to make a “choice” based on which witnesses “should be believed”.

6. Respondents contend that there was no error in denying such cross-examination and in refusing an offer of proof with respect to the foregoing.

If the Congressional and judicial statements of fun-

damental fairness are sound and are to be preserved, it must be obvious that facts of this nature can only be ascertained by cross-examination and offer of proof. *Powhatan Mining Co. v. Ickes*, 118 F. 2d. 105, 110 (C.C.A. 6, 1941).

7. Respondents cite the *Inland Steel Case*, 105 F. 2d. 246 (C.C.A. 7, 1939) (Resp. Br. 50). But in a subsequent phase of that same case, *Inland Steel Co. v. N. L. R. B.*, 109 F.2d 9, 20 (C.C.A. 7, 1940), the same court reversed an order of the Board on grounds parallel to those alleged here. It quoted with approval a New York state case, holding:

“* * * *The first idea in the administration of justice * * * is that a judge must necessarily be free from all bias and partiality. He cannot be both judge and party, arbiter and advocate in the same cause. Mankind are so agreed in this principle that any departure from it shocks their common sense and sentiment of justice.*”

Much of this case turns on “choice” of evidence and which witnesses “should be believed”. No reflection whatsoever is suggested as to the personal integrity of the gentlemen involved. But it is respectfully insisted that where the same witness who testifies subsequently evaluates the probity of his own testimony, as contrasted with conflicting testimony by others, this is too great a strain on the:

“inclination of the human mind to attach more importance to its own statements than to those of others.” *Maitland v. Zanga*, 14 Wash. 92 (1896) It denies the “rudiments of fair play” (Pet. Op. Br. 85-90).

8. Respondents contend that adherence to these legal requirements would “effectively stop the administrative process” (Resp. Br. 51). This is error. No change whatever is required. The Administrative Procedure Act, §11, 5 U.S.C.A. 1010, provides for per-

manent appointment of "qualified and competent" examiners, or as used here, Presiding Officers. Presiding Officers, like courts, acquire "expertness" through participation and study in particular fields. Their tenure is secure, freed from political pressures. Competent Presiding Officers, like courts, are qualified to hear conflicting testimony and to decide which witnesses "should be believed" without being guided, in writing the findings, by the *ex parte* aid of one of the parties litigant.

CONCLUSION

Petitioner has shown that the First and Second Final Orders are not in accordance with law and void because they are: (a) made without observance of the procedure required by law; (b) unsupported by substantial evidence; (c) in excess of statutory jurisdiction; (d) arbitrary, capricious, and an abuse of discretion; and finally (e) contrary to constitutional right.

It is respectfully submitted that petitioner's prayer should be granted for an order permanently setting aside and annulling and perpetually enjoining the First Final Order of the Administrator, and the Second Final Order of the Acting Administrator, dated, respectively, March 10, 1948, and August 3, 1948, entitled "Docket No. FDC-50, *In the Matter of Establishing Definitions and Standards of Identity and Amending the Standard of Fill of Container for Canned Oysters.*"

Respectfully submitted,

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